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Supreme Court, U.S.
FILED
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No. 07-

IN THE

Supreme Court of the United States

MAXITILE, INC.,
a California corporation,

Petitioner,

v.

JIMING SUN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a bankruptcy court has the authority in a Chapter 11 proceeding to enjoin a lawsuit against a third party that is "related to" a bankruptcy proceeding.

LIST OF PARTIES

While Chen Ling Sun appeared as a captioned appellant at earlier stages of this proceeding, the district court held that she was not an appellant. App., *infra*, 7a n.1.

STATEMENT PURSUANT TO RULE 29.6

Mexalit Industrial S.A. de C.V. ("Industrial") is a sister company to Petitioner Maxitile, Inc. ("Maxitile"). The parent company of both Maxitile and Industrial is Mexalit, S.A. Maxitile, Industrial and Mexalit, S.A. are privately owned.

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1 Collier on Bankruptcy (15th ed. 1994) 9

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The opinion and orders of the court of appeals (App., *infra*, 1a-5a, 87a-88a), are unreported. The order of the district court (App., *infra*, 6a-53a) is unreported. The orders of the bankruptcy court (App., *infra*, 54a-69a and 70a-86a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2007. A petition for rehearing and rehearing en banc was denied on August 9, 2007 (App., *infra*, 87a-88a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

11 U.S.C. § 105(a):

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 524(e):

> Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

28 U.S.C. § 157(a):

> Each district court may provide that any or all cases arising under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 1334(b):

> Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

STATEMENT OF THE CASE

Petitioner Maxitile, Inc. ("Maxitile") sought Chapter 11 bankruptcy protection in February 2002 to resolve pending and potential claims arising from its distribution of Maxiplank roofing and siding products, manufactured in Mexico by its sister company, Mexalit Industrial S.A. de C.V. ("Industrial"), that were alleged to have been defective. App., *infra*, 7a-9a. Maxitile warranted the products installed on property in the United States. *Id.* at 8a. Among those who purchased siding from Maxitile was the respondent, Jiming Sun. *Id.*

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334. The approved bankruptcy reorganization plan ("Plan") obligated Maxitile to pay all valid product defect claims asserted in the 30-year warranty period. *Id.* at 9a. Industrial agreed to be the principal funding source for the payments, to forego its multimillion dollar claim against Maxitile (for products delivered to Maxitile prepetition), and to reimburse Maxitile for all payments to valid siding and roofing claimants under the Plan. *Id.* at 9a-10a. The Plan contained a "channeling injunction" requiring the resolution of all warranty claims as set forth in the Plan and enjoining claimants and potential claimants from "commencing or continuing any action, in any manner, in any place that does not comply with or is inconsistent with the provisions of the Plan." *Id.* at 13a (quoting Plan at 40-41).

Sun filed a proof of claim in the bankruptcy court in June 2002 for damages sustained as a result of alleged defects in the siding installed on his home. *Id.* at 17a-

18a. But in July 2002, Sun filed a complaint in California state court against Industrial on Sun's behalf and on behalf of a class of "individuals and entities that own homes or other structures in the States of California, Washington and Oregon on which Maxiplank siding manufactured by Mexalit S.A. has been installed since 1992, and all individuals and entities who replaced Maxiplank siding due to defects in the Product." *Id.* at 18a (internal quotation marks omitted).

Sun's complaint, which asserted various state-law claims against Industrial, including fraudulent concealment and unfair competition, alleged that Maxitile had made false statements in connection with its product warranty, and that Mexalit S.A. – the parent company of Maxitile and Industrial – was the alter ego of Maxitile and was thus liable for Maxitile's alleged misrepresentations. *Id.* at 18a-19a. After Sun learned that Maxiplank was manufactured by Industrial, he dismissed Mexalit and named Industrial as a defendant. *See id.* at 19a n.24.

In November 2003, Maxitile filed its Plan and disclosure statement. *Id.* at 19a. Without any objection from Sun, the bankruptcy court confirmed the Plan in February 2004. *Id.* Sun did not appeal the confirmation. *Id.* Then, following confirmation, Sun served notice of withdrawal of his claim from the Maxitile bankruptcy and pressed forward with his state-court claims. *Id.* at 20a.

Maxitile objected. *Id.* On October 27, 2004, the bankruptcy court issued an order enjoining Sun from prosecuting the state-court action.[1] *Id.* at 54a. The bankruptcy court held that the "centerpiece of the Plan" was "a mechanism for resolving claims . . . of persons and entities who had purchased product distributed by Maxitile" as well as "to channel all of these claims to that mechanism so that third parties (i.e., Industrial) could be induced to contribute their money to this procedure and, as a result, would get the protection of the Channeling Injunction." *Id.* at 58a-59a. The bankruptcy court explained that "[a] necessary element to the success of Maxitile's reorganization effort is the protection of Industrial as the funding source of the Plan. But for giving Industrial this protection, it would not have released its multi-million dollar claim against Maxitile and agreed to the reimbursement obligation established by the Plan." *Id.* at 59a. The bankruptcy court added that "[w]ithout the release of the claim and the reimbursement agreement, this Court could not have found the Plan to be feasible." *Id.*

Sun appealed the order. *Id.* at 22a. The district court held that the bankruptcy court was without authority to enjoin Sun from pursuing the state-court action because, under the law of the Ninth Circuit, a bankruptcy court has no authority to enjoin suits against non-debtors like Industrial. *Id.* at 41a-47a. The Ninth Circuit affirmed, holding that enjoining Sun's action against Industrial

[1] The bankruptcy court also found Sun to be in contempt of the confirmation order and the channeling injunction. The district court reversed this finding, because the Plan was allegedly ambiguous in this regard. The contempt issue is not a subject of this petition.

would have the impermissible effect of discharging the liabilities of a non-debtor: "'This court has repeatedly held, without exception, that [11 U.S.C.] § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors.'" *Id.* at 5a (alteration in original) (quoting *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995)).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE A WELL-DEVELOPED CIRCUIT SPLIT AND HOLD THAT BANKRUPTCY COURTS HAVE THE AUTHORITY TO ENJOIN A THIRD-PARTY LAWSUIT AGAINST A NON-DEBTOR THAT RELATES TO A BANKRUPTCY PROCEEDING.

The courts of appeal are deeply split on the question of whether a bankruptcy court has the authority to enjoin a lawsuit against a non-debtor that relates to a bankruptcy proceeding. The Second, Fourth, and Sixth Circuits have held that a bankruptcy court has such authority in certain circumstances. *See In re Drexel Burnham Lambert Group, Inc. v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992) ("[A] [bankruptcy] court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."); *In re A.H. Robins Co. v. Official Comm. of Equity Sec. Holders (In re A.H. Robins Co.)*, 880 F.2d 694, 701 (4th Cir. 1989) (bankruptcy court had equitable power to enjoin bankruptcy creditors from suing third parties "[g]iven the impact of the proposed suits on the bankruptcy reorganization and the fact that the class [] members who

chose to opt-out could have had their claims fully satisfied by staying within the settlement"); *In re Dow Corning Corp. v. Dow Corning Corp. (In re Dow Corning)*, 280 F.3d 648, 658 (6th Cir. 2002) (articulating a seven-factor test to determine whether bankruptcy court could confirm plan of reorganization containing injunction in favor of non-debtor third party).

The Ninth and Tenth Circuits, in contrast, have held that a bankruptcy court has no such authority. *See Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989); *Landsing Diversified Props.-II v. First Nat'l Bank & Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 601 (10th Cir. 1990), *modified on other grounds by Abel v. West*, 932 F.2d 898 (10th Cir. 1991).

The Ninth Circuit's rationale – which was subsequently followed by the Tenth Circuit in *In re Western Real Estate Fund* – is that 11 U.S.C. § 524(e) precludes the bankruptcy court from discharging the debt of a non-debtor, and that enjoining a third-party action has just that effect. But this reasoning is ill-founded. First, section 524(e), which provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt[,]" should not be read to circumscribe a bankruptcy court's authority. Section 524(e) simply explains the "effect of the debtor's discharge. It does not prohibit the release of a non-debtor." *Dow Corning*, 280 F.3d at 657; *see also In re Heron, Burchette*, 148 B.R. 660, 687 (Bankr. D.D.C. 1992) (noting that § 524(e) "contains no language of prohibition and [thus] should not be interpreted to limit [the] court's power under [11 U.S.C.] § 105(a)").

Second, injunctive relief does not always result in the discharge of a non-debtor. In this case, for example, enjoining the lawsuit against Industrial would *not* equate to a discharge of Industrial's "debt." Because Industrial is the funding source in the Plan, creditors have the ability through the Plan to reach Industrial's assets to satisfy their claims against Maxitile *despite* the injunction.

Third, section 524(e) only applies to the liability of another entity for the *debtor's* debt, not the liabilities of a third-party. *See id.* ("discharge of a debt of the debtor does not affect the liability of any other entity . . . for, *such* debt"). Sun has maintained in this litigation that its lawsuit against Industrial is different from its claim in the bankruptcy court against Maxitile. If that is true, then Sun cannot now claim that Industrial's liability in that case is the same as Maxitile's debt.

In fact, this Court has held, in the context of a Chapter 11 proceeding, that the bankruptcy court *has* broad authority to enjoin third-party lawsuits that "relate to" a bankruptcy proceeding. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). *See id.* at 310 (jurisdiction of bankruptcy courts may extend more broadly in Chapter 11 rather than Chapter 7 proceedings).

In *Celotex*, this Court held that the bankruptcy court's "jurisdiction to enjoin respondent's proceeding" is grounded in the "arising under," "arising in," or "related to" language of 28 U.S.C. §§ 1334(b) and 157(a). *Id.* at 307. This Court noted that while "Congress did not delineate the scope of 'related to' jurisdiction,"

id. at 307, "its choice of words suggests a grant of some breadth." *Id.* at 307-08. This Court held that the "[p]roceedings 'related to' the bankruptcy include . . . *suits between third parties which have an effect on the bankruptcy estate.*" *Id.* at 307 n.5 (citing 1 Collier on Bankruptcy ¶ 3.01[1][c][iv], p. 3-28 (15th ed. 1994)) (emphasis added). This broad jurisdictional grant allows bankruptcy courts to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Id.* at 308 (internal quotation marks omitted). The position of the Ninth and Tenth Circuits is flatly inconsistent with this Court's decision in *Celotex*.

Moreover, even if the bankruptcy court's authority to enjoin a third-party existed only in "unusual circumstances" (as is the case in the Second, Fourth, and Sixth Circuits), this is just such a case. Industrial, albeit a third-party, was expressly designated in the Plan as the debtor's funding source for the claims at issue. App., *infra*, at 9a. Because Industrial is the funding source in the Plan, and as creditors can reach Industrial's assets to satisfy their claims through the bankruptcy court as a result, allowing the bankruptcy court to restrict claims against Industrial outside the Plan is equitable. And to the extent Sun's case against Industrial overlaps with the claim he made in the bankruptcy court, that too constitutes a reason why the bankruptcy court should be able to preclude the former.

Moreover, the bankruptcy court expressly found that, absent protecting Industrial from third-party claims based upon the same allegedly defective siding, Industrial would never have signed onto the Plan. The bankruptcy court explained that protecting Industrial from state-court claims such as Sun's was "a necessary element to the success of Maxitile's reorganization

effort[.]" *Id.* at 59a. And but for the bankruptcy court's ability to enjoin actions like Sun's against Industrial, Industrial "would not have released its multi-million dollar claim and agreed to the reimbursement obligation established by the Plan" and that as a result the Plan would not have been feasible. *Id.*

The bankruptcy court's findings were not disturbed by the district court or the Ninth Circuit. Given that the bankruptcy court's ability to enjoin actions like Sun's was critical to the successful reorganization of Maxitile, the bankruptcy court's injunction was appropriate even if the scope of its injunctive power is limited to "unusual circumstances."

II. PROHIBITING BANKRUPTCY COURTS FROM EVER ENJOINING LAWSUITS AGAINST THIRD PARTIES WOULD UNDERMINE THEIR AUTHORITY TO REORGANIZE BANKRUPT ESTATES.

One of the bankruptcy court's central functions is to bring about successful reorganizations. Bankruptcy courts have broad powers under the Bankruptcy Code and should be permitted to issue orders that ensure the successful reorganization of entities seeking the protection afforded under Chapter 11.

To that end, a bankruptcy court should be permitted in the exercise of its discretion to issue orders such as the injunction at issue here. For example, the bankruptcy court in this case set forth in great detail why its reorganization plan hinged upon its ability to enjoin lawsuits against Industrial, and why, without that

authority, it would have been unable to secure a meaningful reorganization plan for Maxitile's creditors. Should the Ninth Circuit's approach remain the law, bankruptcy courts would be improperly hamstrung from fulfilling their statutory and equitable obligations to design and implement reorganization plans for the benefit of debtors and creditors.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 22, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-56273

D.C. No. CV-04-09779-MMM

In re: MAXITILE, INC.,
a California corporation,

Debtor,

MAXITILE, INC.,
a California corporation,

Appellant,

v.

JIMING SUN; et al.,

Appellees.

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Appendix A

Argued and Submitted May 17, 2007
Pasadena, California

MEMORANDUM*

Before FISHER and CLIFTON, Circuit Judges, and FOGEL,** District Judge.

Maxitile, Inc. appeals the district court's reversal of the bankruptcy court's contempt order against Jiming Sun. We have jurisdiction pursuant to 28 U.S.C. §§ 158, 1291. We affirm.

The district court correctly found that Sun's notice of appeal was timely, because the contempt order entered by the bankruptcy court did not constitute a separate final judgment, as required under Fed.R.Civ.P. 58, made applicable to bankruptcy courts by Fed. R. Bankr.P. 9021. To comply with Rule 58, "[a] sheet containing the judgment, usually prepared by the clerk, must be 'distinct from any opinion or memorandum.'" *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir.1989) (quoting *Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir.1987)). Here, the contempt order contained sufficient discussion of facts and reasoning such that it was an opinion or memorandum, and thus it cannot be considered a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

separate final judgment which starts the clock for the filing of an appeal. *See Mitchell v. Idaho,* 814 F.2d 1404, 1405 (9th Cir.1987); *cf. United States v. Schimmels (In re Schimmels),* 85 F.3d 416, 421-22, 422 (9th Cir.1996) (holding that "a brief order that gives no detailed explanations and does not contain an opinion or memorandum" is a separate judgment).

Hollywood v. City of Santa Maria, 886 F.2d 1228 (9th Cir.1989), is not controlling here. *Hollywood* recognized that "with respect to a *final judgment,* . . . the separate entry rule requires entry of a document distinct from any opinion or memorandum," but that there was no need "to extend this judgment rule to orders denying Rule 59 motions." *Id.* at 1231. Sun appeals here from a final judgment, not from the denial of a Rule 59 motion, making *Hollywood* inapplicable. *See id.* at 1232 ("In the context of final judgments, the requirement that the dispositive document be distinct from any opinion serves to eliminate confusion as to which order ends the litigation. No comparable risk . . . exists with respect to an order denying a motion for new trial where the order is properly entered on the docket sheet.") (internal citation omitted); *see also id.* at 1231 n. 6 (noting that Hollywood's plaintiff "is not attempting to appeal from the order denying the motion for a new trial, but rather from the underlying judgment"); *cf. Webb v. Ada County,* 285 F.3d 829, 836 (9th Cir.2002) (distinguishing *Hollywood* where a Rule 59 motion was partially granted and the district court requested parties to submit a new amended final judgment).

The district court also correctly concluded that Maxitile's confirmed Plan of Reorganization was ambiguous as to whether the bankruptcy court's injunction reached claims made against Mexalit Industrial S.A. de C.V. Although Industrial's funding role is mentioned in the Plan, the Plan consistently defines the claims to be released as those against Maxitile alone. The injunction, both as described by the Plan and as detailed in the bankruptcy court's confirmation order, prohibits actions brought "against the Debtor, the Reorganized Debtor or their property" and actions based on released liabilities. The Plan and confirmation order both suggest that the subject liabilities are only those which run against Maxitile, a view the Disclosure Statement does not dispel. Because Maxitile's confirmed Plan is at best ambiguous on the question of whether actions against third parties are enjoined, that aspect of the Plan is not isolated from review in the current action by res judicata. *See Miller v. United States*, 363 F.3d 999, 1004 (9th Cir.2004) ("If indeed [a plan provision] is deemed to have been ambiguous, then the principles of res judicata do not operate to bar the [creditor] from asserting its position."); *cf. Enewally v. Washington Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1172-73 (9th Cir.2004) ("[I]n the unique bankruptcy context, 'the principle of res judicata should be invoked only after careful inquiry because it blocks unexplored paths that may lead to truth . . . .'" (quoting *Latman v. Burdette*, 366 F.3d 774, 784 (9th Cir.2004)) (ellipsis in original)); *Unsecured Creditors' Comm. of Robert L. Helms Constr.*

& Dev. Co. v. Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co.), 139 F.3d 702, 704 & n. 3, 706 & n. 12 (9th Cir.1998) (en banc).

Without the protection of res judicata, the type of injunction Maxitile seeks to ascribe to its Plan cannot stand. "This court has repeatedly held, without exception, that [11 U.S.C.] § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir.1995). Despite the label Maxitile suggests, to give this injunction the effect Maxitile urges would allow it to operate functionally as a discharge of Industrial's potential liability on Sun's misrepresentation-rooted state law claims—an impermissible discharge of a nondebtor's liabilities. *See Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.)*, 885 F.2d 621, 626-27 (9th Cir.1989).

AFFIRMED.

APPENDIX B — ORDER REVERSING BANKRUPTCY COURT'S CONTEMPT ORDER AND INJUNCTION OF STATE COURT ACTION FILED JULY 19, 2005

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 04-09779 MMM
BANKRUPTCY NO. LA 02-15046 BB

IN RE: MAXITILE, INC., a California corporation,

Debtor.

JIMING SUN, CHEN LING SUN,

Appellants,

vs.

MAXITILE, INC.,

Appellee.

ORDER REVERSING BANKRUPTCY COURT'S CONTEMPT ORDER AND INJUNCTION OF STATE COURT ACTION

The debtor in this bankruptcy proceeding, Maxitile, Inc., distributed defective roofing and siding products that were manufactured in Mexico by Maxitile's sister

company, Mexalit Industrial S.A. de C.V. ("Industrial"). Appellant Jiming Sun[1] installed the defective siding on his home. While Maxitile's Chapter 11 reorganization was in progress, Sun filed a class action in Los Angeles Superior Court against Industrial, alleging that Maxitile was Industrial's agent, and that it had falsely represented the siding products it sold were without defect. Although Sun's state court action did not name Maxitile as a defendant, the bankruptcy court found that his prosecution of the case violated the channeling injunction entered in Maxitile's bankruptcy case.

I. FACTUAL BACKGROUND

Prior to filing its bankruptcy petition, Maxitile sold fiber-cement roofing and siding products manufactured by Industrial, a company incorporated and headquartered in Mexico.[2] After it filed a Chapter 11 bankruptcy petition on February 20, 2002, Maxitile sold roofing and siding products manufactured by Industrial and Eureka S.A. de C.V. ("Eureka").[3] Maxitile, Industrial

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1. Although Sun's wife, Chen Ling Sun, appealed the bankruptcy court's ruling with her husband, appellant's opening brief was filed solely on Sun's behalf. The parties, moreover, identify Sun as the sole appellant. This is undoubtedly because the bankruptcy court did not hold Ms. Sun in contempt, as it found that she was not a party to the state court action that gave rise to the contempt finding. (Order Enjoining Jiming Sun From Continued Prosecution Of The State Court Action at 9.)

2. Second Amended Plan Of Reorganization ("Plan") at 1.

3. *Id.*

and Eureka are all subsidiaries of Mexalit, S.A. ("Mexalit"); each of the three subsidiaries operates independently.[4] Although Maxitile does not manufacture the roofing and siding products it sells, it warrants the products if they are installed on property located in the United States.[5] Industrial does not warrant roofing and siding products distributed by Maxitile in the United States.[6] Among those who purchased siding from Maxitile and installed it on their homes in the United States were appellant Jiming Sun ("Sun") and his wife, Chen Ling Sun.[7]

In this appeal, Sun challenges an order issued by the bankruptcy court enjoining Sun from prosecuting his state court class action, and finding that the prosecution of that suit was in contempt of the order confirming Maxitile's reorganization plan. At issue is whether the second amended plan of reorganization ("Plan") contained a specific and definite order enjoining lawsuits against non-debtor third party Industrial. Sun contends that the scope of the injunction included in the Plan was ambiguous, and that any injunction of creditors' claims against a third party contravenes Ninth Circuit law.

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4. *Id.*

5. *Id.*

6. *Id.*

7. Appellant's Opening Brief ("Appellant's Br.") at 6.

Appendix B

In the bankruptcy court, Maxitile identified two primary factors that led it to seek reorganization: (i) a general drop in sales in the roofing and siding industry during 2001, and (ii) purchasers' complaints and claims regarding defects in the roofing and siding products it sold.[8] At the time Maxitile filed for bankruptcy, it owed substantial sums to Industrial for roofing and siding products it had purchased.[9] Indeed, Maxitile's principal liabilities were "(i) Maxitile's obligation to Industrial for purchase of products pre-petition, and (ii) pending, threatened and potential product liability and/or warranty lawsuits relative to the [p]roducts that it s[old]."[10] Maxitile's Plan, approved by the bankruptcy court, obligated Maxitile to pay fully all valid product defect claims that were asserted within the 30-year warranty period.[11] The Plan provided that Industrial would be the principal funding source for these payments, in that it was to receive no payment on

8. *Id.* at 2-3.

9. Debtor's Second Amended Disclosure Statement Describing Debtor's Second Amended Plan Of Reorganization ("Disclosure") at 7 (indicating that Industrial initially made a claim of $2,907,152.13 against Maxitile's bankruptcy estate and that negotiations with Maxitile led to a reduced claim of $1,453,576).

10. Plan at 2; see also Disclosure at 6.

11. Plan at 14-15 (providing for full payment); 29 (providing that future claimants will have rights identical to those of current warranty claimants).

Maxitile's multi-million dollar debt, and was to reimburse Maxitile for all payments to siding and roofing warranty claimants under the Plan.[12]

The Plan indicates that Industrial's agreement to fund the payment of creditors' warranty claims, and to forgive its claim against Maxitile followed negotiations between the two companies regarding Maxitile's potential claims against Industrial. A section of the Plan titled "Maxitile's Potential Claims Against Industrial" states:

> "To the extent that Industrial sold defective product to Maxitile, Maxitile and/or Maxitile in behalf of its creditors, may have claims, including alter ego claims, against Industrial for such defective product on product liability and/or alter ego theories.
>
> However, following the filing of the Voluntary Petition, Maxitile and Industrial engaged in extended negotiations, resulting in an agreement set forth in this Plan and explained in Section V.F. of the Disclosure Statement, pursuant to which Industrial will receive no payment on its substantial claim for Products delivered by Industrial to Maxitile prepetition, and Industrial will reimburse Maxitile for any payments Maxitile delivers to Small Current Warranty Claimants, Mid-

12. *Id.* at 7.

Appendix B

> Level Current Warranty Claimants, Current Warranty Claimants and Future Warrant[y] Claimants in accordance with this Plan Of Reorganization and as set forth in the Replacement Warranties appended to this Plan Of Reorganization."[13]

The Plan further states:

> "As a result of Maxitile's negotiations with Industrial on Maxitile's potential claims against Industrial, including potential alter-ego and other claims that might be asserted by Maxitile in behalf of its creditors and/or by creditors themselves, Industrial will receive no payments on its prepetition Claim, and Industrial has agreed to reimburse to Maxitile an amount equal to the amount to be paid by Maxitile to Claimants holding Allowed Warranty Claims."[14]

This paragraph, which was in a section on the classification and payment of claims, and which bears the subheading "Industrial Reimbursement," is the only

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13. Plan at 3.

14. Id. at 16. Although, as Sun notes, the Plan defines "Claim" to mean "a claim, as that term is defined in the Bankruptcy Code section 101(5), against Maxitile" (see Plan at 5), the "claims" referenced in this paragraph are plainly those that could have been asserted against Industrial by Maxitile and its creditors.

portion of the Plan or the Disclosure Statement that mentions creditors' direct claims against Industrial in any way. The paragraph does not state that such claims will be *released* under the Plan. Rather, it states that Maxitile "negotiated" with Industrial respecting certain types of claims, and that as a result of the negotiations, Industrial had agreed to forego payment of its claim and to reimburse Maxitile for warranty claim payments that it made. Nearly identical language appears in the Disclosure Statement that was mailed to creditors, including Sun, regarding the Plan.[15]

The channeling injunction included in the Plan was printed in bold italic print, and provided:

"E. Injunction

> On the Effective Date, the Bankruptcy Court will enter a Channeling Injunction that requires the resolution of all Small Current Warranty Claims, Mid-Level Current Warranty Claims, Current Warranty Claims, and Future Warranty Claims to be resolved in the manner set forth in this Plan (the "Channeling Injunction"). In other words, pursuant to the Channeling Injunction, all Claims of Class 2, Class 3, Class 4 and Class 5 Claimants (Small Current Warranty Claimants, Mid-Level Current Warranty Claimants, Current Warranty Claimants, and

15. Disclosure at 14.

Future Warranty Claimants) against Maxitile *must* be resolved in the manner set forth in this Plan.

More specifically, except as provided in the Plan or the Confirmation Order, as of the Confirmation Date, all entities that have held, currently hold or may hold a Claim or other debt or liability that is discharged or an Interest or other right of the equity security holder that is terminated pursuant to the terms of the Plan are enjoined from taking any of the following actions against the Debtor, the Reorganized Debtor or their property on account of any such discharged Claims, debts or liabilities or the terminated Interest or rights: (i) commencing or continuing, in any manner or in any place, any action or other proceeding; (ii) enforcing, attaching, collecting or recovering in any manner any judgment award, decree or order; (iii) creating, perfecting or enforcing any lien or encumbrance; (iv) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to the Debtor or Reorganized Debtor; and (v) commencing or continuing any action, in any manner, in any place that does not comply with or is inconsistent with the provisions of the Plan.

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As of the Effective Date, all entities that have held, currently hold or may hold a Claim, demand, debt, right, cause of action or liability that is released pursuant to the Plan are enjoined from taking any of the following actions on account of such released Claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or liabilities: (i) commencing or continuing in any manner any action or other proceeding; (ii) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order; (iii) creating, perfecting or enforcing any lien or encumbrance; (iv) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to any released entity; and (v) commencing or continuing any action, in any manner, in any place that does not comply with or is inconsistent with the provisions of the Plan.

By accepting a distribution pursuant to the Plan, each holder of an Allowed Claim receiving distributions pursuant to the Plan will be deemed to have specifically consented to the injunction set forth in this Section.

Substantial consummation of the Plan notwithstanding, pursuant to the Bankruptcy Court's retention of jurisdiction hereunder, Maxitile reserves the right to seek entry of

> further orders in aid of confirmation from the Bankruptcy Court to safeguard the sources of funding for performance of the plan.[16]

Prior to the date the bankruptcy court approved the Plan, all creditors, including Sun, received the Plan and Disclosure Statement, a ballot to vote on the Plan, and letters in support of the Plan from the president of Maxitile and counsel for the Warranty Committee.[17] The Disclosure Statement explained the compromise of potential claims against Industrial as follows:

> "[P]re-petition, Maxitile purchased Roofing and Siding Products from Industrial, and, as of February 20, 2002, Industrial asserted a claim of $2,907,152.13 against Maxitile for payment of Products delivered but not yet paid for by Maxitile. . . .
>
> [T]o the extent that Industrial sold defective product to Maxitile, Maxitile and/or Maxitile in behalf of its creditors, might have claims, including alter ego claims, against Industrial for such defective product on product liability and/or alter ego theories.
>
> Following the filing of the Voluntary Petition, Maxitile and Industrial engaged in

16. Plan at 40-41 (footnote omitted).

17. See Order Enjoining Jiming Sun From Continued Prosecution Of The State Court Action at 3-4.

extended negotiations over obligations between the two companies.

First, in connection with trying to construct a Plan Of Reorganization which was both fair to all creditors and practical for the Company, Maxitile negotiated with Industrial to reduce its Claim from $2,907,152.13 to $1,453,576, then subsequently agreed that, upon confirmation of the Plan, Industrial would receive *no* payment at all on its $1,453,576 Claim.

Second, Industrial agreed that it would reimburse Maxitile for any payments Maxitile makes to Small Current Warranty Claimants, Mid-Level Current Warranty Claimants, Current Warranty Claimants, and Future Warrant[y] Claimants in accordance with a Plan Of Reorganization and as set forth in the Revised Warranties appended to the Plan."[18]

As can be seen, the Disclosure Statement's discussion of Industrial's agreement to compromise its claims against Maxitile did not, in any manner, suggest that direct actions against Industrial by users of its siding and roofing products were to be released as part of the Plan.

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18. Disclosure at 7.

The Disclosure Statement describes the channeling injunction to be entered as follows:

> "Maxitile will receive a discharge and Maxitile will receive a channeling injunction requiring all warranty Claims to be resolved as set forth in the Plan. On the Effective Date, the Bankruptcy Court will enter a Channeling Injunction that requires the resolution of all Small Current Warranty Claims, Mid-Level Current Warranty Claims, Current Warranty Claims and Future Warranty Claims (all Claims asserted against Maxitile relating to Damaged Products) to be resolved in the manner set forth in this Plan (the "Channeling Injunction"). In other words, pursuant to the Channeling Injunction, all Claims of Class 2, Class 3, Class 4 and Class 5 Claimants (Small Current Warranty Claimants, Mid-Level Current Warranty Claimants, Current Warranty Claimants and Future Warranty Claimants) against Maxitile *must* be resolved in the manner set forth in this Plan."[19]

II. PROCEDURAL HISTORY

Maxitile's Chapter 11 bankruptcy petition was filed February 20, 2002. In June 2002, Sun filed a proof of

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19. Disclosure at 62. This paragraph was accompanied by a footnote, which read: "Maxitile believes it vital that the Bankruptcy Court enter a channeling injunction that requires the resolution of all claims against Maxitile in the manner as set forth in the Plan." *Id.* at 62, n. 11.

claim in the bankruptcy court for damages sustained as a result of purported defects in the Maxiplank siding installed on his home. On July 1, 2002, Sun filed a complaint in Los Angeles Superior Court against Mexalit and Does 1-20. Sun sued on his own behalf and on behalf of a class of "individuals and entities that own homes or other structures in the States of California, Washington and Oregon on which Maxiplank siding manufactured by Mexalit S.A. has been installed since 1992, and all individuals and entities who replaced Maxiplank siding due to defects in the Product."[20] Sun pled claims for fraudulent concealment, violation of California's Consumer Legal Remedies Act (Civil Code §§ 1770 et seq.), and violation of California's Unfair Competition Act (Business & Professions Code §§ 17200 et seq.) ("UCL"). Sun's complaint alleged that defendants, acting "through a wholly owned subsidiary, Maxitile," had "advertised and sold to Plaintiff and the Class exterior siding that they knew was defectively designed and formulated."[21] It asserted that defendants made misrepresentations in their marketing materials, including the product warranty,[22] and alleged that the

20. Class Action Complaint For Damages And Restitution ("Sun's Complaint") at 7. The complaint "[e]xcluded from the Class . . . defendants, any entity in which defendants have a controlling interest, and their legal representatives, assigns and successors. Also excluded [were] the judge to whom this case [was] assigned and any member of the judge's immediate family." (*Id.*)

21. *Id.* at 2.

22. *Id.*

statement in Maxitile's product warranty that the siding would "not crack, rot or deliminate" was untrue.[23] Sun alleged that Maxitile was an alter ego of Mexalit, and therefore that Mexalit was liable for the acts of Maxitile alleged in the complaint.[24] Specifically, Sun asserted that Mexalit could be held liable for misrepresentations allegedly made by Maxitile.[25] Sun is represented in state court by Berding & Weil, LLP, the same firm that currently represents him in this proceeding.

On November 26, 2003, Maxitile filed its Plan and Disclosure Statement. Although Sun received the Plan and Disclosure Statement, he did not object to confirmation of the Plan. In fact, no creditor or party in interest objected.[26] Sun did not attend any of the three hearings the bankruptcy court held concerning approval of the Plan.[27] On February 20, 2004, the bankruptcy court issued an order confirming the Plan. Sun did not appeal the confirmation order.

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23. *Id.* at 3.

24. *Id.* at 10-13. Sun has since dismissed Mexalit as a defendant, and seeks to prosecute the state court action against Industrial. Sun disclaims any intention to pursue alter ego allegations against Industrial, explaining that "the 'alter ego' allegations in Plaintiff's Complaint are **only** directed against Mexalit, S.A." (See Appellant's Br. at 9-10 (emphasis original).)

25. Sun's Complaint at 10-13.

26. See Order Enjoining Jiming Sun From Continued Prosecution Of The State Court Action at 4.

27. *Id.* at 3-4.

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On December 8, 2003, after discovery conducted in the state court action revealed that the siding distributed by Maxitile was manufactured by Industrial, rather than Mexalit, Sun dismissed Mexalit as a defendant and named Industrial as Doe 1.[28] Following confirmation of the Plan, counsel for the Suns served notices of withdrawal of the Suns' claims in the Maxitile bankruptcy proceeding. On June 18, 2004, Maxitile filed a response to the notices of withdrawal, opposing any "attempt [by the Suns] to avoid the Bankruptcy Court's jurisdiction and to unilaterally rescind the binding terms of the confirmed chapter 11 Plan. . . ."[29] Maxitile asserted that the withdrawal of the claims was "an attempt by the Claimants to pursue claims, including, but not limited to, alter ego claims against certain of the funding sources provided in the confirmed chapter 11 Plan Of Reorganization."[30] Sun continued to prosecute the state court action against Industrial. On July 2, 2004, he took the deposition of Nils Djurklou, Maxitile's president.[31] Sun also successfully opposed a motion by Industrial to quash service of the state court summons and complaint.[32]

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28. Appellant's Br. at 6-7.

29. Maxitile's Notice And Response To Notices Of Withdrawal Of Claims By Jiming Sun and Chen Ling Sun at 1.

30. *Id.* at 1-2.

31. See Declaration of Steven R. Weinmann In Opposition To Motion For Order Of Contempt, Exh. B.

32. *Id.*, Exh. H.

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On August 26, 2004, Maxitile filed a motion in the bankruptcy court for an order to show cause why the Suns should not be held in contempt of the order confirming the Plan. The bankruptcy court issued an order to show cause, and the parties appeared before Judge Sheri Bluebond on September 29, 2004 for a hearing. On October 27, 2004, the bankruptcy court issued an order enjoining the Suns from continued prosecution of the state court action, accompanied by findings of fact and conclusions of law.

The bankruptcy court found that "[t]he filing and prosecution of the State Court Action [wa]s in contempt or violation of the Confirmation Order."[33] As respects the scope of the channeling injunction, the court found that "[i]t is clear from the breadth of the second paragraph of the Channeling Injunction that actions against non-debtor third parties are to be enjoined as well [as actions against the debtor] – so long as the gist of such non-debtor third party actions is to recover for a claim that is to be resolved under the Plan and/or shares a supplemental nexus with claims by or against Maxitile's bankruptcy estate."[34] In addition to holding that Sun was in contempt of the confirmation order and the channeling injunction, the court enjoined Sun from taking any further steps to prosecute the state court action.[35]

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33. Order Enjoining Jiming Sun From Continued Prosecution Of The State Court Action at 7.

34. *Id.*

35. *Id.* at 9.

It indicated that the injunction "applie[d] to all persons or entities that installed Product[s] distributed by Maxitile prior to the date of the Confirmation Order," but not "persons or entities that installed Product[s] distributed by Maxitile subsequent to the date of the Confirmation Order."[36] The court did not award attorneys' fees or sanctions against Sun.[37]

Sun appeals the order finding him in contempt and enjoining his continued prosecution of the state court action.

II. DISCUSSION

A. Standard Of Review

A bankruptcy court's decision to hold a creditor in contempt is reviewed for abuse of discretion. Its underlying factual findings are reviewed for clear error. See *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003) ("We review the decision to impose contempt for an abuse of discretion, and underlying factual findings for clear error"). The bankruptcy court's interpretation of the scope of its injunctive order raises a question of law, which is reviewed *de novo.* See *Cables and Accessories, Inc. v. Brewer (In re Cables and Accessories, Inc.)*, 92 Fed Appx. 435 2004 WL 259256, * 2 (9th Cir. Feb. 11, 2004) (Unpub. Disp.) ("The

36. *Id.*

37. *Id.* at 10.

bankruptcy court's determination of the scope of its order granting Brewer an exception to the automatic stay presents a question of law, which we review *de novo"); see also State Bar v. Taggert (In re Taggert),* 249 F.3d 987, 990 (9th Cir. 2001) (bankruptcy court's determination of questions of law is reviewed *de novo,* while its factual findings are reviewed for clear error); *Expeditors International of Washington, Inc. v. Official Creditors Committee (In re CFLC, Inc.),* 166 F.3d 1012, 1015 (9th Cir. 1999) (same). Because issues of law are reviewed *de novo, "[a]n* exercise of discretion based on an erroneous interpretation of the law 'can be freely overturned.'" *Arden v. Motel Partners (In re Arden),* 176 F.3d 1226, 1228 (9th Cir. 1999) (quoting *La Grand Steel Products Co. v. Goldberg (In re Poole, McGonigle & Dick, Inc.),* 796 F.2d 318, 321 (9th Cir. 1986)).

B. The Res Judicata Effect Of The Confirmation Order

Appellee contends that Sun's failure to object to the Disclosure Statement and the Plan and to appeal the confirmation order, prevents him from now challenging its provisions.[38] Once a bankruptcy plan is confirmed, it is binding on all parties, and all questions that could have been raised pertaining to the plan are entitled to res judicata effect. *Trulis v. Barton,* 107 F.3d 685, -691 (9th Cir. 1995); see also *Enewally v. Wash. Mut. Bank (In re Enewally),* 368 F.3d 1165, 1172 (9th Cir. 2004) (same). The Ninth Circuit has held that a creditor who fails to

38. Appellant's Br. 17-19.

object to an illegal provision in a reorganization plan and fails to appeal the confirmation of the plan cannot later challenge the plan collaterally, even if it contains illegal provisions. *Great Lakes Higher Education Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1086 (9th Cir. 1999) (holding that an order confirming a reorganization plan has preclusive res judicata effect as to all issues that could or should have been litigated at the confirmation hearing, and explaining that "[i]f a creditor fails to protect its interests by timely objecting to a plan or appealing the confirmation order, it cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code. This court has recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions" (internal quotation marks and citation omitted)); *In re Gregory*, 705 F.2d 1118, 1121 (9th Cir. 1983) ("The order confirming the plan has become final. Lawrence's failure to raise this objection at the confirmation hearing or to appeal from the order of confirmation should preclude its attack on the plan or any provision therein as illegal in a subsequent proceeding").

The Ninth Circuit has applied this rule specifically to bar a collateral attack on a reorganization plan that impermissibly discharged the liability of a non-debtor. See *Stratosphere Litigation, LLC v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 (9th Cir. 2002). Although acknowledging "that a bankruptcy court [could not] confirm a reorganization plan that discharge[d] the liabilities of a third party," the court held that res judicata

barred appellant "from collaterally challenging the bankruptcy court's confirmation of Stratosphere's second reorganization plan . . . even if [it] contained illegal provisions." *Id.*

Res judicata, or claim preclusion, precludes the parties from relitigating matters that were raised in a prior action involving the same parties and that are the subject of a final judgment on the merits. *Rein v. Providian Financial Corp.*, 270 F.3d 895, 898-99 (9th Cir. 2001). "Although confirmed plans are res judicata to issues therein, the confirmed plan has no preclusive effect on issues that . . . were not sufficiently evidenced in a plan to provide adequate notice to the creditor." *In re Enewally, supra*, 368 F.3d at 1173; see also *County of Ventura Tax Collector v. Brawders (In re Brawders)*, 325 B.R. 405, 411 (9th Cir. BAP 2005) ("[A] plan should clearly state its intended effect on a given issue. Where it fails to do so it may have no res judicata effect for a variety of reasons: any ambiguity is interpreted against the debtor, any ambiguity may also reflect that the court that originally confirmed the plan did not make any final determination of the matter at issue, and claim preclusion generally does not apply to a 'claim' that was not within the parties' expectations of what was being litigated. . ."); *Miller v. United States (In re Miller)*, 284 B.R. 121, 124 (N. D. Cal. 2002) ("In order for res judicata to have effect, however, there must be a final decision on the merits of the particular issue. . . . If the plan is ambiguous, then this Court cannot find that a claim is barred by res judicata until it unravels the ambiguity and determines how that claim was actually resolved.

The ambiguity may also reflect the absence of any final decision on the merits of the particular issue at stake").

Thus, the order confirming Maxitile's Plan will be res judicata on the issue of creditors' right to assert claims against Industrial *only* if the Plan unambiguously enjoined actions against non-debtor third parties. To the extent it did, it is entitled res judicata effect because Sun had an opportunity to challenge the channeling injunction as improper or beyond the bankruptcy court's power during confirmation proceedings. If, however, the scope of the injunction was so ambiguous that it did not give creditors notice that suits against non-debtors such as Industrial were to be enjoined, it will not have preclusive effect on that issue.

C. Whether The Bankruptcy Court's Order Clearly Enjoined Prosecution Of Claims Against Industrial

Sun asserts that the Plan, the Disclosure Statement, and the court's order confirming the Plan did not include a specific, definite statement that Maxitile's creditors were enjoined from prosecuting claims against Industrial related to product defects.[39]

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39. Sun also contends that his state court unfair business practices, Consumer Legal Remedies Act and fraudulent concealment claims are not "based on the defect in the product itself." (Appellant's Br. at 18.) Sun asserts that the claims "only involve the [product] defect in the sense that the statements which were misleading and [which] constitute[ ] the basis for an

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The bankruptcy court concluded that the following language in the injunction precluded creditors from pursuing claims against Industrial:[40]

> "As of the Effective Date, all entities that have held, currently hold or may hold a Claim, demand, debt, right, cause of action or liability that is released pursuant to the Plan are enjoined from taking any of the following actions on account of such released Claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or liabilities: (i) commencing or continuing in any manner any action or other proceeding; (ii) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order; (iii) creating, perfecting or enforcing any lien or encumbrance; (iv) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to any released entity; and (v) commencing or continuing any action, in any

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unfair business practice [claim], would not have been untrue if the product did not have a defect." (*Id.* at 22.) Because the court concludes that the bankruptcy court erred in enjoining Sun's prosecution of any claims against Industrial, it need not determine whether the state court claims were related to product defects.

40. See Hearing Transcript at 7 (concluding that the second paragraph of the channeling injunction reaches actions against Industrial by Warranty Claimants).

> manner, in any place that does not comply with or is inconsistent with the provisions of the Plan."

This paragraph bars Claimants[41] from taking various actions on account of "*released* Claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or liabilities." Nowhere in the Plan, however, is there any language releasing creditors' causes of action against Industrial. The only mention of creditors' claims against Industrial is in a portion of the Plan that details Industrial's agreement to reimburse Maxitile for payments made to Warranty Claimants. Even here, the reference is oblique, describing "Maxitile's negotiations with Industrial on Maxitile's potential claims against Industrial, including potential alter-ego and other claims that might be asserted by Maxitile and/or by Maxitile in behalf of its creditors and/or by creditors themselves."[42]

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41. Claimants, as defined in the Plan, are individuals or entities that assert a Claim against the bankruptcy estate. A Claim, as noted earlier, is defined as a claim against Maxitile. (See Plan at 5, 6.)

42. Plan at 16. Although this language suggests that Maxitile had the right to assert - and compromise - creditors' claims against third parties, a debtor-in-possession does not generally have the right to assert creditor claims against third parties. See *American Tissue, Inc. v. Arthur Andersen, L.L.P.*, 275 F.Supp.2d 398, 404 (S.D.N.Y. 2003) ("'[i]t is well settled that a bankruptcy [debtor-in-possession] has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself,'" quoting *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 117 (2d Cir. 1991) (alterations original)).

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Absent any language in the plan *releasing* creditors' claims against Industrial, the language in the channeling injunction that precludes Claimants from commencing or continuing suits on released rights or causes of action does not unambiguously encompass actions against Industrial.[43]

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43. In the bankruptcy court, Maxitile's counsel argued that the fact the Plan used the term "channeling injunction" put creditors on notice that the injunction extended to claims against third parties. See 8 COLLIER ON BANKRUPTCY, ¶ 1141.02 (15th ed. rev. 2005) ("In some extraordinary cases, courts have approved injunctions barring actions by future claimants against third party codebtors. These cases typically have involved a 'channeling' of claims to a fund, with a bar against pursuing the sources of funding, such as insurance policy proceeds"); George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANK. DEV. J. 19, 102 (2004) ("A channeling injunction is a type of permanent third party release. Generally, these injunctions direct or 'channel' all suits against certain non-debtors to a settlement fund created by these third parties to satisfy any actual or potential claims. These potential litigants agree (1) that their claims will be satisfied by a finite fund and (2) to become permanently enjoined from initiating or continuing any suits against the non-debtors who have contributed to the settlement fund after the assets in the fund are exhausted" (footnotes omitted))); see also *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir.), cert. denied, 488 U.S. 868 (1988) (approving a permanent "channeling" injunction enjoining tort actions against the debtor's liability insurers because the insurers were contributing to a trust fund established to pay tort claimants in full). The discussion of the channeling injunction in the Disclosure Statement, however, strongly suggested that it was limited to claims against Maxitile. (See Disclosure Statement at 62 ("Maxitile will receive a discharge and *Maxitile* will receive a

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(Cont'd)
channeling injunction requiring that all warranty Claims . . . be resolved as set forth in the Plan. On the Effective Date, the Bankruptcy Court will enter a Channeling Injunction that requires the resolution of . . . all Claims asserted *against Maxitile* relating to Damaged Products . . . in the manner set forth in this Plan. . . . In other words, pursuant to the Channeling Injunction, all [warranty] Claims . . . *against Maxitile must* be resolved in the manner set forth in this Plan" (emphasis added))). This is consistent with the manner in which the term "channeling injunction" is used in cases where present and future claims *against the debtor* are "channeled" to a single claims resolution procedure. See Georgene Vairo, *Mass Torts Bankruptcies: The Who, The Why and The How*, 78 AM. BANKR. L.J. 93, Appendix A at 142 (2004) ("Recommendation 2.1.4 proposes expanding [11 U.S.C. §] 524 to authorize courts to issue in all cases involving future claims so-called 'channeling injunctions,' which would prohibit future claimants from pursuing any of the debtor's present or future assets other than those specifically designated assets that, as part of the plan of confirmation, had been placed into a trust to be administered by the future claims representative for the payment of future claims"). Although pre-petition debts are automatically discharged by confirmation of a reorganization plan (see 11 U.S.C. § 524(a) ("A discharge in a case under [11 U.S.C. §§ 101 et seq.] . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived")), post-petition debts are not discharged in the absence of an appropriate injunction. See *In re Combustion Engineering, Inc.*, 391 F.3d 190, 234 (3d Cir. 2005) (discussing the requirements of 11 U.S.C. § 524(g), which "provides a special form of supplemental injunctive relief" in which "[c]hanneling asbestos-related claims to a personal injury trust relieves the debtor of the uncertainty of future asbestos liabilities").

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The ambiguity created by the absence of release language is compounded by the definitions used in the Plan. The Plan defines "Claim" as "a claim . . . *against Maxitile*"[44] A "Claimant" is "one who asserts a Claim *against the Estate*"[45] The definition of "Warranty Claim" incorporates the limitation that "Claims" are claims asserted against Maxitile, in that a "Warranty Claim" is defined as "any Claim asserted by a Claimant in any way related to any defect in and/or damage allegedly caused by Product distributed by Maxitile."[46] The definition of Warranty Claim, in turn, is incorporated in the Plan's definition of "Channeling Injunction" as "the injunction to be issued by the Bankruptcy Court requiring that all Warranty Claims be resolved in accordance with this Plan's Claims Resolution Procedure."[47]

In combination, these definitions indicate that the injunction applies only to claims against Maxitile. Consistent with the definitions contained in the Plan, the Disclosure Statement provided that

> "Maxitile will receive a discharge and *Maxitile will receive* a channeling injunction requiring all *warranty Claims* to be resolved as set forth in the Plan. . . . On the Effective Date, the

44. Plan at 5 (emphasis added).

45. *Id.* at 6 (emphasis added).

46. *Id.* at 13.

47. *Id.* at 5.

> Bankruptcy Court will enter a Channeling Injunction that requires resolution of . . . *all Claims asserted against Maxitile* relating to Damaged Products. . . in the manner set forth in this Plan. . . . [P]ursuant to the Channeling Injunction, all Claims of . . . Small Current Warranty Claimants, Mid-Level Current Warranty Claimants, Current Warranty Claimants and Future Warranty Claimants[ ] *against Maxitile must* be resolved in the manner set forth in this Plan."[48]

The Disclosure Statement, therefore, reinforced the notion that the injunction extended only to claims against Maxitile.

At the hearing, Maxitile's counsel asserted that the parties' intent to give broad scope to the injunction was evident in the paragraph of the Channeling Injunction that reads:

> "Substantial consummation of the Plan notwithstanding, pursuant to the Bankruptcy Court's retention of jurisdiction hereunder, Maxitile reserves the right to seek entry of further orders in aid of confirmation from the Bankruptcy Court to safeguard the sources of funding for performance of the plan."[49]

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48. Disclosure at 62 (italics added).

49. Plan at 41.

Although this paragraph suggests that Maxitile may seek *further* orders beyond those contained in the Plan to effectuate its purposes, it does not, in the absence of further orders, enlarge the scope of channeling injunction set forth in the Plan so that it reaches direct claims by creditors against "sources of funding." The court thus cannot conclude, based on this paragraph, that entry of the channeling injunction barred creditors' right to bring claims against sources of funding like Industrial on res judicata grounds. At most, the provision suggested that Maxitile might seek broader injunctions from the bankruptcy court if necessary to effectuate the reorganization plan. It did not, however, preclude creditors like Sun from opposing the entry of "further orders" on the basis that they exceeded the bankruptcy court's authority or on any other basis.

At the hearing on Maxitile's motion for contempt, the bankruptcy court found that it and the parties intended that the channeling injunction would preclude the assertion or prosecution of claims against Industrial. The court conceded, however, that "[t]here are some gaps in terms of what is exactly said [in the order]."[50] It acknowledged that the Plan "isn't the world's greatest drafting job," that it "could have been written more clearly,"[51] and that it "underst[ood] the ambiguities that [Sun was] raising."[52]

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50. Hearing Transcript at 4.

51. *Id.* at 9.

52. *Id.* at 31-32.

Despite the ambiguities identified by Sun and acknowledged by the bankruptcy court, Maxitile contends that Sun's attempt to withdraw his claim from the bankruptcy proceedings demonstrates that *he* understood the intended scope of the channeling injunction, and that he is therefore barred from challenging it. Maxitile asserts that Sun withdrew his claim in Maxitile's bankruptcy because he knew that the injunction would prohibit him from proceeding with his state court lawsuit, and he sought to avoid being bound by the injunction. At the hearing, Sun's counsel asserted that Sun's withdrawal of his claim was not an acknowledgment that the channeling injunction restrained creditors from bringing claims against third parties; rather, he argued, it was an election to pursue remedies against Industrial rather than Maxitile.

Maxitile's argument confuses two concepts – whether the Plan is ambiguous, in which event it cannot be given res judicata effect, and how the Plan should be interpreted, which requires a finding regarding the parties' true intentions. "A Chapter 11 bankruptcy plan is essentially a contract between the debtor and his creditors, and must be interpreted according to the rules governing the interpretation of contracts." *Miller v. United States*, 363 F.3d 999, 1004 (9th Cir. 2004); see also *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n.*, 997 F.2d 581, 588 (9th Cir. 1993) ("A reorganization plan 'resembles a consent decree and therefore, should be construed basically as a contract,' with state law controlling its interpretation"). Whether a plan is ambiguous is a question of law, and is governed by the

"well-established maxim of contractual interpretation that a contract is ambiguous if it is 'capable of more than one reasonable interpretation.'" *Id.;* see also *Wolf v. Superior Court*, 114 Cal.App.4th 1343, 1351 (2004) ("The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal"); *Apple Computer, Inc. v. Assessment Appeals Bd.*, 105 Cal.App.4th 1355, 1371 (2003) (same)[53].

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53. Under California law, "[t]he interpretation of a contract involves 'a two-step process: "First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step – interpreting the contract. The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.'" *Wolf, supra*, 114 Cal.App.4th at 1350-51 (citations & footnotes omitted). Maxitile cites the fact that no other creditor has attempted to initiate an action against Industrial as extrinsic evidence that all creditors understood the Plan to prohibit such actions. Additionally, it cites Sun's attempt to withdraw his claim in the bankruptcy proceeding as evidence that he understood the Plan in this manner. This evidence may show that the Plan is reasonably susceptible of the interpretation Maxitile gives it. It does not demonstrate, however, that the Plan is unambiguous or

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Here, the Plan is clearly susceptible of more than one interpretation regarding the extent of the channeling injunction being entered. It is thus ambiguous, and cannot be given res judicata effect.[54] See *id.* at 1004

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that Sun's contrary interpretation is unreasonable. "Whether the contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself." *United Teachers of Oakland v. Oakland Unified Sch. Dist.*, 75 Cal.App.3d 322, 330 (1977). Here, on its face, the Plan is reasonably susceptible of Sun's interpretation because its definition of "channeling injunction" incorporates its definition of "Warranty Claim," and that definition is limited to claims against Maxitile. Furthermore, while the channeling injunction enjoins actions based on "released" claims, no language in the Plan "releases" claims against Industrial. Because the Plan is arguably susceptible of two interpretations, it is ambiguous, and cannot be given res judicata effect.

54. Maxitile contends that, to the extent the Plan is ambiguous, Sun should have objected or requested clarification. (See Appellee's Br. at 12-13.) As noted, however, the language of the ' Plan and Disclosure Statement appears to limit the scope of the injunction to causes of action against Maxitile. Sun's failure to object or request clarification, therefore, is understandable. Additionally, ambiguities in the Plan must be construed against the debtor. See *County of Ventura Tax Collector v. Brawders (In re Brawders)*, 325 B.R. 405, 411 (9th Cir. BAP 2005); *Miller v. United States (In re Miller)*, 253 B.R. 455, 459 (Bankr. N.D. Cal. 2000) (applying California contract law and finding "[t]he ambiguity in the plan should be resolved against the Debtor because Debtor drafted the plan"); *Aino v. Maruko, Inc. (In re Maruko Inc.)*, 200 B.R. 876, 881 (Bankr. S.D. Cal. 1996) ("[A]mbiguities which exist in a chapter 11 plan are to be

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(evaluating the res judicata effect of a reorganization plan, and explaining "[i]f indeed Article XI is deemed to have been ambiguous, then the principles of res judicata do not operate to bar the government from asserting its position"); *County of Ventura Tax Collector v. Brawders (In re Brawders)*, 325 B.R. 405, 411 (9th Cir. BAP 2005) ("[A] plan should clearly state its intended effect on a given issue. Where it fails to do so it may have no res judicata effect for a variety of reasons: any ambiguity is interpreted against the debtor, any ambiguity may also reflect that the court that originally confirmed the plan did not make any final determination of the matter at issue, and claim preclusion generally does not apply to a 'claim' that was not within the parties' expectations of what was being litigated, nor where it would be plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme"); *Educ. Credit Mgmt. Corp. v. Repp (In re Repp)*, 307 B.R. 144, 148 (9th Cir. BAP 2004) ("[S]ince claim preclusion is an affirmative defense, the debtor has the burden of proof on all elements and bears the risk of non-persuasion").

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construed against its drafter"). Any lack of clarity in the scope of the injunction must, as a result, be construed against Maxitile. This is particularly true since Maxitile knew that Sun had commenced a state court action in 2002. In December 2003, *prior to confirmation of the Plan*, Sun amended his state court complaint to name Industrial as a defendant. To the extent Maxitile intended to have the Plan prohibit prosecution of Sun's pending state court action, it had an opportunity to amend the Plan to make the scope of the injunction clear prior to the Plan's confirmation on February 20, 2004. Maxitile offers no explanation for its failure to do so.

The fact that Sun, by his conduct, may have evidenced an understanding of the Plan that is consistent with defendants' interpretation of the Plan does not show that it is unambiguous.[55] Rather, it relates to the interpretation to be given the ambiguous language of the Plan. See *Winet v. Price*, 4 Cal.App.4th 1159, 1165 (1992) (noting that the trial court must make a "threshold" determination of ambiguity, and that "the second step" is interpreting the contract). Here, the bankruptcy court interpreted the Plan's channeling injunction in its order finding Sun in contempt and enjoining his further prosecution of the state court lawsuit. Because the Plan language was ambiguous, and cannot be given res judicata effect, Sun retains the ability to challenge the bankruptcy court's interpretation, and its power to issue an injunction of the breadth reflected in the contempt order at this stage of the proceedings.

In sum, given the ambiguous language of the Plan, which referenced "released" rights and causes of action, but contained no release language, and used defined terms in a way that confined the scope of the injunction

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55. Sun's counsel argued at the hearing that the withdrawal of his bankruptcy claim did not evidence knowledge that the channeling injunction barred claims against third parties such as Industrial. Rather, he asserted, it shows that Sun had elected to pursue remedies against Industrial rather than Maxitile. The court need not determine which party's interpretation of Sun's actions is correct, since even if Sun withdrew his claim because he understood that the injunction would bar his state court lawsuit against Industrial, this does not render the injunction, as set forth in the Plan, unambiguous.

to claims against Maxitile, and given the description of the channeling injunction set forth in the Disclosure Statement, which limited its reach to claims against Maxitile, the court is constrained to conclude that "the confirmed plan has no preclusive effect on issues that . . . were not sufficiently evidenced in a plan to provide adequate notice to the creditor." See *In re Enewally, supra,* 368 F.3d at 1173. Because the Plan and the channeling injunction do not unambiguously prohibit creditors from prosecuting claims against Industrial, the order confirming the Plan was not res judicata on that issue.[56] As a consequence, the court must address Sun's

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56. Maxitile is also incorrect that Sun is not a "person aggrieved" and lacks standing to pursue this appeal because he failed to attend hearings on the Plan in bankruptcy court and failed object to confirmation. (Appellee's Br. at 19-20.) Sun does not appeal the order confirming the Plan. Rather, he appeals the subsequent order finding him in contempt and enjoining his state court action. Even were he appealing confirmation of the Plan, moreover, Sun would not lack standing. Although objection and attendance are generally prerequisites to "person aggrieved" status, Maxitile's failure to give proper notice that the Plan released claims against non-debtors excused Sun from satisfying these prerequisites in this case. See *In re Commercial Western Finance Corp.,* 761 F.2d 1329, 1335 (9th Cir. 1985); *In re Schultz Mfg. & Fabricating Co.,* 956 F.2d 686, 690 (7th Cir. 1992) (holding that attendance and objection "are excused if the objecting party did not receive proper notice . . . of his opportunity to object to the action proposed to be taken. In that case, the requirements of due process outweigh those of judicial efficiency and certainty" (internal quotations and citations omitted)).

The ambiguous language of the Plan and the Disclosure Statement was not reasonably calculated to give Sun notice that

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his claims against Industrial would be affected by confirmation of the Plan. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (to satisfy due process, notice must be "reasonably calculated to convey the required information..."); *In re ATD Corp.*, 278 B.R. 758, 763 (Bankr. N.D. Ohio 2002) ("if the Court were to construe this ambiguous bar date order in the manner that Debtor urges, it would run afoul of Movants' due process rights under the Fifth Amendment to the United States Constitution. Constitutional due process requires that notice of a claims bar date 'be fundamentally fair and reasonably calculated to apprise interested parties'"); *In re Allbev, Inc.*, 160 B.R. 61, 64 (Bankr. W.D.N.C. 1993) ("To have been adequate, the Conversion Notice should have explicitly stated that conversion of the case from Chapter 11 to Chapter 7 required creditors who had not been required to file proofs of claim while the Debtor was in Chapter 11 to file proofs of claim to preserve their claims. Without an explicit statement to this effect, the Conversion Notice was constitutionally inadequate under due process standards. Creditors such as Pine Brook did not receive 'notice reasonably calculated, under all the circumstances, to apprise interested parties' of the effect of the conversion and of the bar date").

"The constitutional [due process] requirements, as specifically applied to bankruptcy proceedings, [also] require that the creditor be afforded all the notice statutorily required." *In re Barsky*, 85 B.R. 550, 553 (C.D. Cal. 1988). Bankruptcy Rule 3016(c) requires that "[i]f a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction." Bankruptcy Rule 3020(c) requires that "[i]f the plan provides for an injunction against conduct not otherwise enjoined

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contention that the bankruptcy court lacked the authority to enjoin suits against a non-debtor. See *In re Miller, supra,* 284 B.R. at 124 ("the presence of ambiguity will require interpretation of the plan in a later proceeding, and in that proceeding a party may raise a claim contesting the meaning of the plan").

D. Whether A Bankruptcy Court May Enjoin Suits Against A Non-Debtor

Sun contends that the bankruptcy court lacked authority to enter an order enjoining litigation against a non-debtor.[57] Bankruptcy courts have jurisdiction over certain matters "related to" Title 11 cases. See 28 U.S.C. § 1334(b) (conferring on district courts "original but not exclusive jurisdiction of all civil proceedings arising

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under the Code, the order of confirmation shall (1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction." The Plan and the channeling injunction did not satisfy the notice requirements of Bankruptcy Rules 3016(c) and 3020(c). Although the channeling injunction was "conspicuously" set forth in bold italic print in both the Plan and the Disclosure Statement, it was not "specific" regarding the acts that were being enjoined, nor did it "describe [those acts] in reasonable detail." In short, the Plan and the Disclosure Statement failed to give creditors adequate constitutional and statutory notice that their claims against Industrial might be compromised, and Sun would be a "person aggrieved" even if his appeal were construed as a challenge to the Plan.

57. Appellant's Br. at 19-20.

under title 11, or arising in or related to cases under title 11"); 28 U.S.C. § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district"); *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 & n. 5 (2002) (recognizing that Congress' "related to" terminology "suggests a [jurisdictional] grant of some breadth," and noting that "[p]roceedings 'related to' the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate"); *In re American Hardwoods, Inc.*, 885 F.2d 621, 623 (9th Cir. 1989) ("An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action").

Although bankruptcy courts possess broad "related to" jurisdiction, their power to enjoin litigation against a non-debtor third party is limited by 11 U.S.C. § 524(e), which provides that "[e]xcept as provided in subsection (a)(3) of this section [pertaining to spouses' community property], discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).

The circuits are split as to whether 11 U.S.C. § 524(e) bars a bankruptcy court from enjoining litigation against a party other than the debtor. See generally Jason J. Jardine, *The Power of the Bankruptcy Court to Enjoin Creditor Claims Against Nondebtor Parties in Light of*

11 U.S. C. § 524(e): In re Dow Corning Corp., 2004 B.Y. U.L. REV. 283, 286 (2004); compare *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657 (6th Cir. 2002) (holding that § 524(e) "does not prohibit the release of a non-debtor"); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4th Cir. 1989) (considering the language of 11 U.S.C. § 524(e), and concluding that § 524(e) did not prevent enforcement of the bankruptcy court's injunction of creditor suits against non-debtor third parties including Robins' directors, Robins' attorneys, Aetna Casualty and Insurance Company (Robins' insurer), and Aetna's attorneys); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987) ("[A]lthough section 524 has generally been interpreted to preclude release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of reorganization") with *Resorts International v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995) ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors"); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 601-02 (10th Cir. 1990) (concluding "that while a temporary stay prohibiting a creditor's suit against a nondebtor . . . during the bankruptcy proceeding may be permissible to facilitate the reorganization process . . . , the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor"), modified sub nom. *Abel v. West*, 932 F.2d 898

(10th Cir. 1991); *In re American Hardwoods, supra*, 885 F.2d at 627 (concluding that, under § 524(e), the bankruptcy court lacked power to enjoin a party permanently from enforcing a state court judgment against a non-debtor); *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) ("[T]he bankruptcy court has no power to discharge the liabilities of a nondebtor pursuant to the consent of creditors as part of a reorganization plan. The broad language of § 524(e), limiting the scope of a discharge so that it 'does not affect the liability of any other entity,' encompasses this result").

As can be seen, the Ninth Circuit has repeatedly held that a bankruptcy court lacks the power to discharge the liabilities of non-debtors as part of a reorganization plan. See *In re Lowenschuss, supra*, 67 F.3d at 1401; *In re American Hardwoods, supra*, 885 F.2d at 627; *Underhill, supra*, 769 F.2d at 1432.[58] In doing so, the

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58. At the hearing, appellee cited *Billington v. Winograde (In re Hotel Mt. Lassen, Inc.)*, 207 B.R. 935, 941 (Bankr. E.D. Cal. 1997), for the proposition that bankruptcy courts may release the liabilities of third parties if the release is part of a voluntary contractual agreement. Specifically, the *Billington* court opined that "[a]lthough the Ninth Circuit's decisions in *Lowenschuss* and *American Hardwoods* do not discuss the permissibility of purely consensual third-party releases, the logic of those decisions does not preclude them." *Id.* at 941, n. 7. *Billington*, however, fails to address binding Ninth Circuit authority, which rejects the theory that a bankruptcy court can properly discharge a non-debtor's liability with the parties' consent. See *Underhill, supra*, 769 F.2d at 1432 (holding that the release of a third party's liability was improper although the

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court has explicitly rejected other circuits' approach to the release of claims against non-debtors in a plan of reorganization. One leading decision adopting the opposite approach is *In re A.H. Robins, supra*, 880 F.2d 694. There, the Fourth Circuit considered the bankruptcy of the manufacturer of the Dalkon Shield. Several appellants who had opted-out of the settlement provided through the Robins bankruptcy sought to sue Robins' insurer, Aetna, as well as Robins' directors and Robins' and Aetna's attorneys, for their injuries. *Id.* at 700. The court held that since the appellants had "chosen opt-out rather than payment in full, they [could] have no complaint about a restriction placed on their ability to sue others." *Id.* at 702. It then addressed the provision in § 524(e) stating that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt," and concluded that it need not "be literally applied in every case as a prohibition on the power of the bankruptcy courts." *Id.* In particular, the Fourth Circuit stated, "where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain other parties, and where the entire reorganization hinges on the debtor

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release was approved by the creditors in accepting a proposed reorganization plan, and explaining "[w]hen a bankruptcy court discharges the debtor, it does so by operation of the bankruptcy laws, not by consent of the creditors").

being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, . . . § 524(e) [does not] . . . limit[ ] the equitable power of the bankruptcy court to enjoin the questioned suits." *Id.*

In *In re Lowenschuss,* the Ninth Circuit noted its disagreement with *In re A.H. Robins.* See *In re Lowenschuss, supra,* 67 F.3d at 1402 ("Lowenschuss argues that in *American Hardwoods* we recognized an exception to § 524(e)'s prohibition on discharging the liabilities of non-debtors and urges us to find that the exception applies here. Lowenschuss looks to our discussion, in dictum in *American Hardwoods,* . . . of the Fourth Circuit's decision in . . . *In re A.H. Robins Co.,* . . . as indicating our approval of the Fourth Circuit's approach. Lowenschuss ignores the clear language of *American Hardwoods,* where we expressly declined to adopt the approach set forth in *In re A.H. Robins;* we stated, in dictum, '[e]ven if we adopted *In re A.H. Robins Co.,* it would not dictate a different result'"). Thus, it is clear that, even in cases where the reorganization plan provides full compensation to creditors, and "hinges" on the release of claims against third parties, the Ninth Circuit permits no exception to "§ 524(e)'s prohibition on discharging the liabilities of non-debtors." *Id.*

As a consequence, the bankruptcy court lacked power to enjoin creditors' suits against Industrial. Apparently mindful of this, the bankruptcy court's contempt order draws "a distinction between

discharging the liability of a non-debtor third party and issuing a Channeling Injunction that imposes a particular procedure for resolution of a claim against a non-debtor third party."[59] The Ninth Circuit has explicitly rejected such a distinction, however. See *American Hardwoods, supra*, 885 F.2d at 626 ("Although the bankruptcy court was powerless to discharge the [non-debtors'] liability, American argues that it seeks a permanent injunction against the enforcement of a judgment – a remedy distinguishable from discharge. 11 U.S.C. § 524(a)(2), however, describes the effect of a discharge 'as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.' We find American's semantic distinction between a permanent injunction and a discharge unpersuasive. A discharge under section 524(a)(2) does not void *ab initio* a liability. Rather, section 524 constructs a legal bar to its recovery. A discharge is in effect a special type of permanent injunction. American seeks the same. The permanent injunction requested by American falls squarely within the definition of a discharge under section 524(a)(2)").

Because it enjoined Sun from prosecuting his state court action against Industrial, a non-debtor, the bankruptcy court exceeded its power under § 524(e), *In re American Hardwoods* and *In re Lowenschuss*. This aspect of its order must, accordingly, be reversed.

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59. See Order Enjoining Jiming Sun From Continued Prosecution Of The State Court Action at 8.

E. The Bankruptcy Court Erred In Finding Sun In Contempt

Rule 9020 of the Federal Rules of Bankruptcy Procedure authorizes the bankruptcy court to find a party appearing before it in civil contempt. If the court believes that a party has committed a contumacious act, it must give the party notice in writing and hold a hearing. FED.R.BANKR.PROC. 9020(b). To support a finding of contempt, the court's order must be clear and specific, and must unambiguously command the party to perform or refrain from performing an act. *In re Keane*, 110 B.R. 477, 483 (S.D. Cal. 1990) (citing *International Long Shoremens Assoc., Local 1291 v. Philadelphia Marine Trade Assoc.*, 389 U.S. 64, 88 (1967)); see also *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) ("If an injunction does not clearly describe prohibited or required conduct, it is not enforceable by contempt"). Here, the court has concluded that the channeling injunction in the Plan was not clear or specific as to whether suits against Industrial were enjoined. Indeed, the Plan contained language that suggested the channeling injunction extended only to claims or actions against Maxitile. Because Sun did not violate a clear and specific order, the bankruptcy court's contempt finding must be vacated.

F. Whether Sun's Appeal Is Equitably Moot

"Mootness is a judicial doctrine with the general rule that the occurrence of events which prevents an appellate court from granting effective relief renders an appeal

moot. An appeal is dismissed as moot if a stay of an order confirming a plan is not obtained and the plan of reorganization is substantially consummated so that effective relief is no longer available." *First Federal Bank v. Weinstein (In re Weinstein),* 227 B.R. 284, 289 (9th Cir. BAP 1998) (citations and footnote omitted). Under the Bankruptcy Code,

> "'substantial consummation' means –
>
> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2).

"The concept of substantial consummation usually arises in the context of plan modification and the binding effect of a confirmed plan." *Jorgensen v. Federal Land Bank of Spokane (In re Jorgensen),* 66 F.R. 104, 107 (9th Cir. BAP 1986) (rejecting an argument that the debtors' appeal was moot because they did "not seek modification of the creditors' plan"). The doctrine of mootness, in the bankruptcy context, "stems from the inability of an appellate court to fashion relief that is both effective and

equitable." *Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006 (9th Cir. 1993); see also *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1074 (9th Cir. 2002) (holding that an appeal was not moot, since "[e]ven if the plan has been substantially consummated, because Platinum's claim is only for monetary damages against solvent debtors, this is not a case in which it would be impossible to fashion effective relief. Nor has there been such a comprehensive change in circumstances as to render it inequitable for the court to consider the merits of the appeal"); *In re Weinstein, supra*, 227 B.R. at 289 ("[T]he fact that a plan is substantially consummated and that the appellant failed to obtain a stay pending appeal does not, by itself, render an appeal moot. The appellate court should still consider whether it can grant effective relief" (internal citation omitted)).

Sun does not seek to modify the Plan through this appeal. Rather, he seeks review of a subsequent order of the bankruptcy court that held him in contempt and interpreted an ambiguity in the Plan. The relief Sun seeks – reversal of the order enjoining his prosecution of the state court action – does not require that the court unwind consummated transactions. Cf. *In re UNR Industries*, 20 F.3d 766, 769 (7th Cir. 1994) (explaining that the doctrine of equitable mootness is consistent with sections of the bankruptcy code that "provide that courts should keep their hands off consummated transactions"). Rather, the court can grant Sun relief by reversing the bankruptcy court's injunction of the state court action against Industrial. In all other respects, the Plan can and will remain intact.

Maxitile asserts that

> "if the State Court Action is allowed to continue, Industrial may become unable to meet its obligations to provide the primary funding for the Plan. In addition, the State Court Action may allow for possible double recovery by members of the State Court Action who have already received compensation under the confirmed Plan."[60]

It presents no evidence, however, that its concerns regarding Industrial's ability to meet its financial obligations are well-founded. As respects its concern that Warranty Claimants may receive a double recovery, Maxitile presents no evidence that any member of the class Sun seeks to represent will be able to avoid the general rule that prohibits double recovery for a single injury. See *Milicevich v. Sacramento Medical Center*, 155 Cal.App.3d 997, 1002 (1984) ("Plaintiff is only entitled to a single recovery of full compensatory damages for a single injury"); *Fletcher v. California Portland Cement Co.*, 99 Cal.App.3d 97, 99 (1979) ("An injured person is entitled to only one satisfaction of judgment for a single harm, and full payment of a judgment by one tortfeasor discharges all others who may be liable for the same injury"). For both reasons, this is not a case in which the court cannot fashion effective relief.

Nor would it be inequitable to grant the requested relief. Sun filed his state court action in 2002. In

60. Appellee's Br. at 23.

December 2003, after Maxitile filed its Second Amended Plan of Reorganization, but prior to confirmation of the Plan, Sun amended his complaint to name Industrial as a defendant. Although Maxitile and Industrial were on notice of the nature of Sun's state court action prior to the confirmation of the Plan, Maxitile failed to take timely action to clarify of the scope of the channeling injunction provided by the Plan. If the plan has been "substantially consummated,"[61] therefore, consummation occurred *after* Maxitile and Industrial knew of Sun's pending claims against Industrial in the state court action.

In *Spirtos,* the court found that it was not inequitable to order the return of erroneously disbursed funds because "[d]ebtor knew at the time he received and spent his plan distribution that Moreno had appealed the bankruptcy court's decision." *Spirtos, supra,* 992 F.2d at 1007. As in *Spirtos,* Maxitile sought confirmation of the Plan and made disbursements under the Plan knowing that Industrial faced potential liability in Sun's state court suit. In the face of this knowledge, Maxitile prepared and submitted an ambiguous plan of reorganization that did not clearly advise creditors, and

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61. Maxitile asserts that "numerous creditors have been granted relief pursuant to the confirmed Plan, and the Plan has been substantially consummated." (Appellee's Br. at 22.) Given the fact that future warranty claimants are to be resolved through the claims resolution procedure, and the 30-year span of the warranty period, it is unclear that the estate has "transfer[red] . . . all or substantially all of the property proposed by the plan to be transferred." See 11 U.S.C. § 1101(2).

specifically Sun, that claims against Industrial were being released. Equity, therefore, does not mandate that Sun's state court action be enjoined.

IV. CONCLUSION

For the reasons stated, the order of the bankruptcy court is reversed.

DATED: July 19, 2005

s/ Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER ENJOINING JIMING SUN FROM CONTINUED PROSECUTION OF THE STATE COURT ACTION OF THE UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION DATED OCTOBER 27, 2004

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

Case No. LA 02-15046-BB

In re

MAXITILE, INC., a California corporation

Debtor and
Debtor-in Possession.

(Taxpayer Identification No. 95-3998636)

ORDER ENJOINING JIMING SUN FROM CONTINUED PROSECUTION OF THE STATE COURT ACTION

This matter came on for hearing upon the request of Maxitile, Inc. ("Maxitile") in its Motion For An Order To Show Cause Why Jiming Sun And Chen Ling Sun Should Not Be Held In Contempt Of This Court's Order Confirming The Debtor's Second Amended Plan Of Reorganization (the "Motion") and this Court's September 3, 2004 entry of an Order To Show Cause Re. Contempt To Jiming Sun And Chen Ling Sun. Any

capitalized terms not defined herein shall have the meanings ascribed to them in the Motion. This Court, having reviewed:

i. The Motion;

ii. Maxitile Inc.'s (1) Request For Judicial Notice, (2) Referral Of Court To Pleadings Previously Filed In The Maxitile Reorganization Proceeding; And (3) Submission Of Transcript, All In Support Of Motion For An Order To Show Cause Why Jiming Sun And Chen Ling Sun Should Not Be Held In Contempt Of This Court's Order Confirming The Debtor's Second Amended Plan Of Reorganization For Maxitile, Inc.;

iii. The Opposition To Motion For Order To Show Cause filed by Jiming Sun and Chen Ling Sun (collectively, the "Suns");

iv. The Suns' Objection To Evidence In Support Of Motion For Order To Show Cause;

v. The Declaration Of Steven R. Weinmann In Support Of Opposition To Motion For Order To Show Cause;

vi. The Suns' Opposition To Motion For Contempt;

vii. Respondent's Objections To Evidence In Support Of Maxitile, Inc.'s Motion For Order For Contempt;

viii. The Declaration of Steven R. Weinmann In Support Of Opposition To Motion For Contempt; and

ix. Maxitile, Inc.'s Response To The Opposition To Motion For Order For Contempt Filed by Jiming Sun And Chen Ling Sun.

Having considered the record in this case, and having heard and considered all arguments, representations of counsel, evidence and testimony presented at or prior to the above-referenced hearing, and on the basis of the evidence presented and the agreements read into the record, makes the following findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules");

A. *Findings of Fact*

1. To the extent that any of the following Findings of Fact are Conclusions of Law or should be deemed to be Conclusions of Law, they shall be so construed.

2. On February 20, 2002, Maxitile commenced this bankruptcy case and shortly thereafter this Court sent to all creditors or interested parties on Maxitile's Master Mailing Matrix — which included the Suns — a Notice Of Commencement relative to Maxitile's bankruptcy case.

3. On June 6, 2002, Jiming Sun filed his Proof Of Claim (Claim No. 133) in the Maxitile bankruptcy case. Mr. Sun indicated in his Proof Of Claim that he believed that he had a general unsecured claim against Maxitile in the amount of $12,500 stemming from Product (as defined in the Plan) that was distributed by Maxitile.

4. On July 1, 2002, the Suns commenced their action against Mexalit S.A. (and later Industrial) in the Superior Court of the State of California for the County of Los Angeles, Case Number BC 276850 (the "State Court Action").

5. The law firm of Berding & Weil was counsel of record for the Suns in the Complaint filed to commence the State Court Action.

6. On October 8, 2002, the United States Trustee filed and served on Maxitile its Notice Of Appointment And Appointment Of Committee Of Creditors Holding Unsecured Warranty Claims (i.e., the Warranty Committee). The Warranty Committee was a special purpose committee that included in its constituency only those persons who purchased pre-petition Product distributed by Maxitile that may have a general unsecured claim based thereon.

7. On November 21, 2002, this Court approved the employment of counsel for the Warranty Committee to assist the Warranty Committee with its sole charge of representing in this bankruptcy case the interests of persons who purchased pre-petition Product distributed

by Maxitile (whether or not such persons had yet experienced any Damage prior to the filing of the voluntary petition).

8. Based on their Proof Of Claim, the Suns were constituents of the Warranty Committee.

9. On December 5, 2003, this Court entered its Order approving Maxitile's Second Amended Disclosure Statement Describing Second Amended Plan Of Reorganization (the "Disclosure Statement") and the associated solicitation materials that included a letter from counsel for the Committee in support of the Plan.

10. The Suns did not object, file a responsive pleading or send a letter to counsel or the Court regarding the approval of the Disclosure Statement or attend any of the three hearings this Court held on the issue.

11. On December 10, 2003, Maxitile caused to be served on all of its creditors — including the Suns — a copy of its approved Disclosure Statement, Plan, ballot to vote on the Plan and letters in support of the Plan from the then President of Maxitile and from counsel for the Warranty Committee. Both the Disclosure Statement and the Plan discussed the bankruptcy estate's proposed compromise with Industrial.

12. The centerpiece of the Plan was the creation of a mechanism for resolving claims (as defined in 11 U.S.C. section 101(5)) of persons and entities who had purchased

product distributed by Maxitile and how to channel all of these claims to that mechanism so that third parties (i.e., Industrial) could be induced to contribute their money to this procedure and, as a result, would get the protection of the Channeling Injunction. A necessary element to the success of Maxitile's reorganization effort is the protection of Industrial as the funding source of the Plan. But for giving Industrial this protection, it would not have released its multi-million dollar claim against Maxitile and agreed to the reimbursement obligation established by the Plan. Without the release of the claim and the reimbursement agreement, this Court could not have found the Plan to be feasible.

13. If Mr. Sun continues to prosecute the State Court Action there is a real risk of irreparable harm to the reorganized debtor and also to the creditors who are looking to this reorganized entity for the recovery of their claims through the Claims Resolution Procedure.

14. There is no hardship to the Suns in requiring them to participate in the Claims Resolution Procedure established by the Plan because it is both reasonable on its face and was extensively negotiated with the participation of the Warranty Committee who was authorized to represent the Suns' interest and did, in fact, represent the Suns' interests. The Claims Resolution Procedure provided the Suns with an efficient mechanism administered by a neutral third party to seek redress for all of their claims relative to product distributed by Maxitile and for which there is a clearly defined pool of funds standing at the ready with which

to make payments to the Suns if indeed they did suffer such damages.

15. The Suns did not vote on the Plan.

16. The Suns did not object, file a responsive pleading or send a letter to counsel or the Court regarding the approval of Plan or attend any of the hearings this Court held on the issue.

17. No creditor or party in interest in this case objected or filed a responsive pleading relative to confirmation of the Plan.

18. On February 4, 2004, Maxitile filed and served its Memorandum Of Law in support of confirmation of the Plan. The Memorandum Of Law discussed the bankruptcy estate's proposed compromise with Industrial.

19. After a noticed hearing on February 18, 2004, this Court entered an Order confirming Maxitile's Second Amended Plan Of Reorganization (the "Confirmation Order") on February 20, 2004.

20. The Suns did not attend the hearing on confirmation of the Plan.

21. The Suns did not request reconsideration or appeal of the Confirmation Order.

22. On March 3, 2004, this Court sent to all creditors or interested parties on Maxitile's Master Mailing Matrix — which included the Suns — a Discharge Of Debtor relative to Maxitile's bankruptcy case.

23. The Suns did not seek reconsideration of or appeal the Confirmation Order.

24. On April 15, 2004, Jiming Sun filed his Notice Of Withdrawal Of Claim pursuant to which he stated, "Claimant hereby withdraws the said claim [the Proof Of Claim filed in his name]."

25. The law firm of Berding & Weil was counsel of record for Jiming Sun in his Notice Of Withdrawal of Claim.

26. On April 15, 2004, Chen-Ling Sun filed her Notice Of Withdrawal Of Claim pursuant to which she stated, "Claimant hereby withdraws the said claim [the Proof Of Claim filed in her name]."

27. The law firm of Berding & Weil was counsel of record for Chen Ling Sun in her Notice Of Withdrawal of Claim.

28. On June 18, 2004, counsel for Maxitile filed its Notice And Response To Notices Of Withdrawal Of Claims By Jiming Sun And Chen Ling Sun.

29. Neither the OSC Opposition nor the Opposition included any allegation or evidence that the Suns

sustained any damages from or relative to Product distributed by Maxitile. Hence, there was nothing before this Court to establish that the Suns sustained any damages arising from or related to Product distributed by Maxitile.

30. Many of the arguments that were made in the OSC Opposition and the Opposition really go to whether or not this Court should have entered the Channeling Injunction and approved the compromise with Industrial at the time of confirmation of the Plan, not whether or not this Court did do those things at the time of confirmation. It is very clear that this Court intended to approve the estate's compromise with Industrial and enter the Channeling Injunction at the time of confirming the Plan.

B. *Conclusions of Law*

1. To the extent that any of the following Conclusions of Law are or should be deemed to be Findings of Fact, they shall be so construed.

2. This Court has jurisdiction over this bankruptcy case and the subject matter of the Motion under 28 U.S.C. section 1334 and the matters set forth in this Order relate to a core proceeding under 28 U.S.C. section 157.

3. The approval of this bankruptcy estate's compromise with Industrial and the entry of the

Channeling Injunction and the Confirmation Order were within the scope of this Court's jurisdiction.

4. Because there was no appeal taken, on March 1, 2004, the Confirmation Order became a final order.

5. The Plan and Confirmation Order provisions that are the subject of the Motion and the dispute between the parties cannot be read in a vacuum. They must be read and interpreted in the context of the Plan structure itself. There would be no need for a separate Channeling Injunction requiring Warranty Claims to be resolved in the manner set forth in the Plan if the Plan provisions were intended to apply solely to actions that may be taken against Maxitile for the purpose of collecting on such claims. The discharge and discharge injunction would suffice to prevent claimants from bringing actions against Maxitile. The claims that are asserted by Mr. Sun, regardless of the specific theory that he has used, are in the nature of Warranty Claims under the Plan and/or share a supplemental nexus with claims by or against Maxitile's bankruptcy estate, in that they are "related to any defect in and/or damage allegedly caused by Product distributed by Maxitile." Mr. Sun's actions against Industrial are merely another vehicle for attempting to collect damages attributable to product distributed by Maxitile.

6. Mr. Sun's claims asserted in the State Court Action are in the nature of a warranty claim by virtue of the fact that it is related to possible defects in or damage allegedly caused by product distributed by Maxitile. The

definition of a warranty claim is not limited to a claim for breach of warranty. Instead, its broad definition includes claims related to or arising out of a defect of the product. Counsel for Mr. Sun's arguments at the above referenced hearing were an admission that Mr. Suns' claims asserted in the State Court Action arise out of a defective product that was distributed by Maxitile.

7. The filing and prosecution of the State Court Action is in contempt or violation of the Confirmation Order. The second paragraph of the Channeling Injunction contained in the Confirmation Order was intended to and does reach the actions such as the State Court Action. The Channeling Injunction required that creditors such as Mr. Sun solely utilize the Claims Resolution Procedure established in the Plan.

8. The structure and/or purpose of the relevant provisions of the Plan is to create a single mechanism for the resolution of claims arising out of or related to Products distributed by Maxitile, which is funded in large part by payments made by Industrial, and to channel the resolution of all such claims to this fund. Industrial would have no incentive to make payments under the Plan if claimants were free to proceed directly against it to recover on such claims. It is clear from the breadth of the second paragraph of the Channeling Injunction that actions against non-debtor third parties are to be enjoined as well — so long as the gist of such non-debtor third party actions is to recover for a claim that is to be resolved under the Plan and/or shares a

supplemental nexus with claims by or against Maxitile's bankruptcy estate. This point could not have been lost on anyone who read the Plan or the Disclosure Statement in its entirety.

9. As the State Court Action is an attempt to recover on account of a claim that was released under the Plan and/or shares a supplemental nexus with claims by or against Maxitile's bankruptcy estate, it is an action in violation of the Channeling Injunction. Accordingly, Mr. Sun should be held in contempt of Court for violating the Channeling Injunction contained in the Confirmation Order and should be enjoined from continuing to prosecute the State Court Action.

10. Maxitile did have the standing and the authority to compromise on behalf of the estate and its creditors the claim that Industrial was/is the alter ego of Maxitile. Maxitile did have standing to compromise claims on behalf of the bankruptcy estate. Once a bankruptcy case has been filed, the estate and only the estate can prosecute a claim that another entity is an alter ego of the debtor (if the facts that give rise to that claim relate generally to the manner in which the debtor did business, its capital structure, etc. as distinguished from specific representations made to a particular creditor alone). Claims of this variety and others (including but not limited to those claims asserted in the State Court Action) can be and were compromised by Maxitile under the Plan on its behalf and on behalf of its pre-petition creditors.

11. There is a distinction between discharging the liability of a non-debtor third party and issuing a Channeling Injunction that imposes a particular procedure for the resolution of a claim against a non-debtor third party. In this case, the Court has done the latter, not the former. This injunction was intended to reach claims against non-debtor third parties such as Industrial.

12. The issuance of the Channeling Injunction and approval of the estate's compromise with Industrial as set forth in the Confirmation Order was a valid use of this Court's 11 U.S.C. section 105 power over matters relating to and disputes/claims against non-debtor third parties that were arising under and/or related to this bankruptcy case, the outcome of which could conceivably have any effect on the Maxitile bankruptcy estate or imperil a successful conclusion to the bankruptcy process. All of the prerequisites to the issuance of the Channeling Injunction existed at the time that this Court entered the Confirmation Order.

13. Any contention that that the Confirmation Order or Channeling Injunction was improper or beyond the scope of this Court's authority comes too late. Even if the Plan contains provisions that are impermissible or inappropriate as a matter of applicable law, the Confirmation Order cannot be collaterally attacked or simply disregarded. What Mr. Sun could have persuaded this Court to do or not to have done relative to confirmation of the Plan and entry of the Confirmation Order is a very different question from whether he can

disregard and collaterally attack the Confirmation Order. Mr. Sun did not object to approval of the Disclosure Statement, did not object to confirmation of the Plan and did not appeal the entry of the Confirmation Order.

14. To the extent that any language used in the Disclosure Statement, Plan or Confirmation Order was vague, could have been more specific or did not lead creditors, such as the Suns, to understand the breadth of the claims against Industrial that were being compromised and/or the scope of the Channeling Injunction, such issues could have and should have been raised timely by creditors and interested parties, including the Suns, at the time of approval of the Disclosure Statement, confirmation of the Plan or entry of the Confirmation Order.

15. Regardless, in approving the estate's compromise with Industrial and issuing the Channeling Injunction and the Confirmation Order, it was this Court's intention to enjoin actions against Industrial such as the State Court Action. Reading the Confirmation Order and Plan together could not lead to any other conclusion.

16. There is an adequate basis in the record before this Court to hold Mr. Sun in contempt of the Confirmation Order.

Appendix C

WHEREFORE, IT IS HEREBY ORDERED THAT:

1. The Suns' evidentiary objections be and hereby are sustained.

2. The Motion be and hereby is denied isofar as it relates to Chen Ling Sun, as it does not appear that she is a party to the State Court Action.

3. The Motion be and hereby is granted insofar as it relates to Jiming Sun.

4. Mr. Sun be and hereby is held in contempt of the Confirmation Order and the Channeling Injunction that it contains.

5. Mr. Sun be and hereby is permanently enjoined from taking any further actions to prosecute the State Court Action.

6. The scope of this Order applies to all persons or entities that installed Product distributed by Maxitile prior to the date of the Confirmation Order. The scope of this Order does not apply to persons or entities that installed Product distributed by Maxitile subsequent to the date of the Confirmation Order.

7. The Court does not rule at this time whether or not an award of attorney's fees and/or sanctions against Mr. Sun and/or his counsel is appropriate.

Appendix C

Dated: 10/27/04

s/ Sheri Bluebond
THE HONORABLE SHERI BLUEBOND
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D — ORDER CONFIRMING THE DEBTOR'S SECOND AMENDED PLAN OF REORGANIZATION FOR MAXITILE, INC. OF THE UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION FILED FEBRUARY 20, 2004

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

Case No. LA 02-15046-BB

Chapter 11

Confirmation Hearing

Date:	February 18, 2004
Time:	10:00 a.m.
Dept.:	1475

In re

MAXITILE, INC., a California corporation

Debtor and
Debtor-in Possession.

(Taxpayer Identification No. 95-3998636)

Appendix D

ORDER CONFIRMING THE DEBTOR'S SECOND AMENDED PLAN OF REORGANIZATION FOR MAXITILE, INC.

This matter came on for hearing upon the request of Maxitile, Inc. ("Maxitile"), proponent of the Second Amended Plan of Reorganization (the "Plan"), with respect to the estate of Maxitile debtor and debtor in possession in the above-captioned chapter 11 bankruptcy case (the "Debtor"). Any capitalized terms not defined herein shall have the meanings ascribed to them in the Plan. This Court, having reviewed:

i. The "Debtor's Second Amended Disclosure Statement Describing The Debtor's Second Amended Plan of Reorganization" and all of its exhibits (the "Disclosure Statement"), including the Plan;

ii. "Maxitile's Motion for Orders (i) Approving Disclosure Materials And Procedures For The Solicitation Of Acceptance Of Maxitile Proposed Plan Of Reorganization, (ii) Setting Date For A Hearing To Confirm The Plan, (iii) Establishing Deadlines And Procedures For Filing Objections To Confirmation Of Plan, And (iv) Approving The Form Of Ballots And Notice Of Confirmation Hearing";

iii. The "Debtor's Memorandum Of Law In Support Of Confirmation Of The Debtor's Second Amended Plan Of Reorganization" (the "Memorandum");

iv. The "Declaration Of Nils Djurklou In Support Of Confirmation Of The Debtor's Second Amended Plan Of Reorganization" with the exhibits attached thereto;

v. The "Declaration Of Andrew Apfelberg In Support Of Confirmation Of The Debtor's Second Amended Plan Of Reorganization" with the exhibits attached thereto;

vi. The "Declaration Of Pamela Cooke In Support Of Confirmation Of The Debtor's Second Amended Plan Of Reorganization" with the exhibits attached thereto;

vii. The "Declaration Of Michael Zlotorynski In Support Of Confirmation Of The Debtor's Second Amended Plan Of Reorganization" with the exhibits attached thereto; and

viii. The "Declaration Of Alvaro Briseno II In Support Of Confirmation Of The Debtor's Second Amended Plan Of Reorganization" with the exhibits attached thereto.

Having considered the record in this case, and having heard and considered all arguments, representations of counsel, evidence and testimony presented at or prior to the hearing on confirmation of the Plan (the "Confirmation Hearing") at the time and place noted in the caption hereto, and on the basis of the evidence presented and the agreements read into the record,

makes the following findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"):

A. A true and correct copy of the Plan is annexed hereto as *Exhibit 1* and incorporated as though set forth in full herein.

B. This Court has jurisdiction over these cases under 28 U.S.C. section 1334 and the matters set forth in this Order relate to a core proceeding under 28 U.S.C. section 157;

C. Notice of the time for filing objections to, and the hearing on, confirmation of the Plan and adequacy of the Disclosure Statement was properly given in accordance with Bankruptcy Rule 2002(b)(2) and the orders of this Court; the form and scope of the notice were appropriate under the circumstances; and all parties in interest had an opportunity to appear and be heard at the hearing on confirmation of the Plan;

D. The time frames established for submitting ballots on the Plan and the procedures by which ballots for acceptance or rejection of the Plan were solicited and tabulated were fair and were properly conducted in accordance with Bankruptcy Rule 3018, section 1126 of title 11 of the United States Code (the "Bankruptcy Code") and the orders of this Court;

E. The Disclosure Statement and other solicitation materials provided to creditors contained "adequate information," as that term is defined in Bankruptcy Code section 1125;

F. The Plan and Maxitile, as the proponent of the Plan, have complied with all the requirements of the Bankruptcy Code, including, without limitation, Bankruptcy Code section 1129;

G. The Plan properly specifies the classification and treatment of all Claims and Interests under the Plan and provides the same treatment for each Claim or Interest in a particular Class;

H. Pursuant to Bankruptcy Code section 1129(a)(1), the Plan complies with the applicable provisions of the Bankruptcy Code;

I. Pursuant to Bankruptcy Code section 1129(a)(2), the Debtor has complied with the applicable provisions of the Bankruptcy Code in proposing the Plan (including, without limitation, Bankruptcy Code sections 1121, 1122, 1123, 1125 and 1127);

J. Pursuant to Bankruptcy Code section 1129(a)(3), the Plan has been proposed in good faith and not by any means forbidden by law;

K. Pursuant to Bankruptcy Code section 1129(a)(4), any payments made or to be made under the Plan by the proponent for services in connection with the case have been approved, or are subject to approval, by the Court as reasonable;

L. Pursuant to Bankruptcy Code section 1129(a)(5), the Plan discloses the identity of the persons who will serve as officers and directors of the Reorganized Debtor,

M. Neither the Debtor nor the Reorganized Debtor is subject to the jurisdiction of any governmental rate regulatory commission of the kind discussed in Bankruptcy Code section 1129(a)(6), and Bankruptcy Code section 1129(a)(6) therefore does not apply;

N. Pursuant to Bankruptcy Code section 1129(a)(7), each member of Classes 1 through 5 will receive under the Plan property of a value as of the Effective Date that is not less than the amount that each would receive if the Debtor were liquidated under chapter 7 of the Bankruptcy Code on that date;

O. Pursuant to Bankruptcy Code section 1129(a)(8), all Classes of Claims or Interests that are impaired under the Plan have accepted the Plan;

P. Pursuant to Bankruptcy Code section 1129(a)(9), all Administrative Claims, Priority Tax Claims and Priority Wage Claims will be paid in accordance with Bankruptcy Code section 1129(a)(9);

Q. Pursuant to Bankruptcy Code section 1129(a)(10), Classes 1 through 5, all of which are impaired under the Plan, have accepted the Plan, determined without including any acceptance of the Plan by an insider;

R. Pursuant to Bankruptcy Code section 1129(a)(11), confirmation of the Plan is not likely to be followed by the need for further financial reorganization of the Debtor or any successor to the Debtor under the Plan;

S. Pursuant to Bankruptcy Code section 1129(a)(12), all fees payable under section 1930 of Title 28 of the United States Code, through the Effective Date, have been paid or will be paid on or before the Effective Date of the Plan;

T. Pursuant to Bankruptcy Code section 1129(a)(13), other than self-funding 401(k) Plan contributions that are matched by the company, the Debtor has no "retiree benefits" within the meaning of Bankruptcy Code section 1114(a) that the Debtor or any successor to the Debtor would be required to continue funding under Bankruptcy Code section 1129(a)(13);

U. Pursuant to 1129(b) the Plan does not discriminate unfairly and is fair and equitable with respect to Classes 1 through 7;

V. Pursuant to Bankruptcy Code section 1129(d), the principal purpose of the Plan is neither the avoidance of taxes nor the avoidance of the application of section 5 of the Securities Act of 1933;

W. The rejection of all the executory contracts and unexpired leases to which the Debtor is a party, other than those that are the subject of entered orders approving and authorizing the Debtor's assumption thereof, done in accordance with the Plan, is a reasonable exercise of the Debtor's business judgment, is in the best interest of the Estate and will aid in the consummation of the Plan;

X. The agreements, settlements, transactions, transfers and injunctions authorized by the Plan, including, but not limited to, the compromise of Maxitile's claims against Mexalit Industrial S.A. de C.V. ("Industrial") set forth in Sections VI and VII of the Plan (and as described at Section V of the Memorandum), the Channeling Injunction and by this Order, are fair and reasonable, are entered into in good faith, are in the best interests of the Estate and help provide adequate means for implementing the Plan;

Y. Pursuant to Bankruptcy Code section 1125(e), Maxitile and its attorneys have acted in good faith with respect to the solicitation of votes on the Plan and thus are entitled to all the protections provided by Bankruptcy Code section 1125(e);

Z. Maxitile and all other parties in interest will be acting in good faith if they proceed to consummate the Plan and the agreements, settlements, transactions and transfers contemplated thereby and to take the actions authorized and directed by this Order, notwithstanding an appeal of this Order, so long as no stay is issued and in effect pending such appeal, even if they act with knowledge of the pendency of that appeal;

AA. Notice of the Confirmation Hearing on the confirmation of the Plan was proper and appropriate under the circumstances, and the approval of those items granted in this Order has been granted after "notice and a hearing," as that phrase is defined in Bankruptcy Code section 102; and

BB. The Court's retention of jurisdiction as set forth in Section XII of the Plan comports with the parameters contained in section 157 of title 28 of the United States Code.

Appendix D

WHEREFORE, IT IS HEREBY ORDERED THAT:

1. The Plan is confirmed and approved in its entirety and shall become effective on the eleventh day after entry hereof, provided this order is a "Final Order" as defined in paragraph 44 on said page 9 of the Plan as of that date. The provisions of the Plan are an effective and binding part of this Order as though such provisions were set forth fully herein. To the extent there exists any conflict or discrepancy between the Plan and the other provisions of this Order, the other provisions of this Order shall control.

2. All objections to confirmation of the Plan that have not been withdrawn or otherwise resolved in the manner stated on the record or in papers filed with the Court are hereby overruled.

3. Except as otherwise provided in the Plan or in this Order, the Reorganized Debtor shall have discretion to administer the estate in conjunction with this Order and as required under the Plan.

4. The Reorganized Debtor, the Debtor and all parties in interest are authorized and directed to consummate in accordance with their terms the Plan and all agreements, settlements, transactions and transfers that are provided for in the Plan, to execute and deliver all documents required to be executed and delivered in connection with the consummation of the Plan, and to take all actions that may be necessary or appropriate to implement any of the provisions of this Order or the Plan.

Appendix D

5. The Claims Resolution Procedure and definition of "Damage" provided for in the Plan, and the compromise of the Debtor's claims against Industrial are approved as just, equitable, reasonable, nondiscriminatory and good faith compromises of the controversies and Claims resolved by such settlements and are binding on all entities affected thereby.

6. Pursuant to the provisions of the Plan, inter alia, holders of Claims in Classes 6 and 7 shall not be entitled to receive any distribution on account of their Classes 6 and 7 Claims. Holders of Class 1 through 5 Claims shall receive payments as provided under the Plan.

7. The agreements, settlements, transactions, transfers and injunctions authorized by the Plan, including, but not limited to, the compromise of Maxitile's claims against Industrial set forth in Sections VI and VII of the Plan are approved.

8. In accordance with Bankruptcy Code section 365(a), the assumptions and rejections of executory contracts and unexpired leases done in accordance with the Plan are approved.

9. Notwithstanding the entry of a Final Decree in the Chapter 11 Cases and entry of this Order or occurrence of the Effective Date, this Court shall retain jurisdiction over the Chapter 11 Case to the extent provided in Section XII of the Plan.

Appendix D

10. Upon the Effective Date, the provisions of the Plan shall bind the Debtor, the Reorganized Debtor, any entity receiving property under the Plan, and any holder of a Claim against or Interest in the Debtor, whether or not the Claim or Interest is impaired under the Plan and whether or not such holder has accepted the Plan.

11. Upon the Effective Date, all Small Current Warranty Claims, Mid-Level Current Warranty Claims, Current Warranty Claims, and Future Warranty Claims must be resolved only in the manner set forth in the Plan (the "Channeling Injunction"). Pursuant to this Channeling Injunction, all Claims of Class 2, Class 3, Class 4 and Class 5 Claimants (Small Current Warranty Claimants, Mid-Level Current Warranty Claimants, Current Warranty Claimants, and Future Warranty Claimants) against Maxitile must be resolved only in the manner set forth in the Plan.

(a) More specifically, except as provided in the Plan, as of the Confirmation Date, all entities that have held, currently hold or may hold a Claim or other debt or liability that is discharged or an Interest or other right of the equity security holder that is terminated pursuant to the terms of the Plan are enjoined from taking any of the following actions against the Debtor, the Reorganized Debtor or their property on account of any such discharged Claims, debts or liabilities or the terminated Interest or rights: (i) commencing or continuing, in any manner or in any place,

any action or other proceeding; (ii) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order; (iii) creating, perfecting or enforcing any lien or encumbrance; (iv) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to the Debtor or Reorganized Debtor; and (v) commencing or continuing any action, in any manner, in any place that does not comply with or is inconsistent with the provisions of the Plan.

(b) As of the Effective Date, all entities that have held, currently hold or may hold a Claim, demand, debt, right, cause of action or liability that is released pursuant to the Plan are enjoined from taking any of the following actions on account of such released Claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or liabilities: (i) commencing or continuing in any manner any action or other proceeding; (ii) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order; (iii) creating, perfecting or enforcing any lien or encumbrance; (iv) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to any released entity; and (v) commencing or continuing any action, in any manner, in any place that does not comply with or is inconsistent with the provisions of the Plan.

(c) By accepting a distribution pursuant to the Plan, each holder of an Allowed Claim receiving distributions pursuant to the Plan will be deemed to have consented specifically to the injunctions set forth herein.

(d) Substantial consummation of the Plan notwithstanding, pursuant to the Bankruptcy Court's retention of jurisdiction hereunder, Maxitile may seek entry of further orders in aid of confirmation from the Bankruptcy Court to safeguard the sources of funding for performance of the Plan.

12. Pamela Cooke is hereby appointed as the Independent Claims Administrator on the terms set forth in the Plan.

13. Following entry of this Order and prior to the occurrence of the Effective Date, the Reorganized Debtor, without necessity of any shareholder action whatsoever, shall execute such documents and take such action as may be necessary to effectuate the transactions provided for in the Plan.

14. Notwithstanding the finding, if one is made, that any term or provision of the Plan that does not govern the treatment of Claims or Interests is invalid, void or unenforceable, this Order nevertheless constitutes a judicial determination that each remaining term and provision of the Plan is valid and enforceable pursuant to its terms.

15. On July 7, 2004 at 10:00 a.m., the Court shall hold an initial post-confirmation Status Conference. On or before June 23, 2004, counsel for the Reorganized Debtor or the Reorganized Debtor shall file and serve its Post-Confirmation Status Conference Report explaining what progress has been made toward consummation of the confirmed Plan Of Reorganization. The initial report shall be served on the United States Trustee, the 20 largest unsecured warranty creditors (the "Committee"), Counsel for the Committee, the Independent Claims Administrator and those parties who have requested special notice. Further Post-Confirmation Status Conference Reports shall be filed and served on the same entities as further ordered by the Court.

The report shall include at least the following information:

(a) A schedule listing for each debt and each class of claims: the total amount required to be paid under the Plan; the amount required to be paid as of the date of the report; the amount actually paid as of the date of the report and the deficiency, if any, in required payments;

(b) A schedule of any and all post-confirmation tax liabilities that have accrued or come due and a detailed explanation of payments thereon;

(c) Debtor's projections as to its continuing ability to comply with the terms of the Plan;

(d) An estimate of the date for Plan consummation and application for final decree; and

(e) Any other pertinent information needed to explain the progress toward completion of the confirmed Plan.

Reporting entities whose equity securities are registered under Section 12(b) of the Securities Exchange Act of 1934 may provide information from their latest 10Q or 10K filing with the S.E.C., if it is responsive to the requirements of this subsection.

16. If the above-referenced case is converted to one under chapter 7, the property of the reorganized debtor shall be revested in the chapter 7 estate, except that, in individual cases, the post-petition income from personal services and proceeds thereof, and post-confirmation gifts or inheritances pursuant to 11 U.S.C. § 541(a)(5)(A) or (a)(6) shall not automatically revest in the chapter 7 estate.

17. When the Plan is substantially administered, the Reorganized Debtor or its attorney shall file an Application for Final Decree closing the Chapter 11 Case.

Dated: FEB 20 2004

s/ Sheri Bluebond
THE HONORABLE SHERI BLUEBOND
UNITED STATES BANKRUPTCY JUDGE

Appendix D

[EXHIBITS INTENTIONALLY OMITTED]

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 9, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-56273

D.C. No. CV-04-09779-MMM
Central District of California,
Los Angeles

In re: MAXITILE, INC.,
a California corporation,

Debtor,

MAXITILE, INC.,
a California corporation,

Appellant,

v.

JIMING SUN; CHEN LING SUN,

Appellees.

Appendix E

ORDER

Before: FISHER and CLIFTON, Circuit Judges, and FOGEL,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Fisher and Clifton have voted to deny the petition for rehearing en banc; and Judge Fogel so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed July 6, 2007, are DENIED.

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* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.